SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 71

LUIS ALVARO CEBALLOS (Y ARBOLEDA),
PETITIONER,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE AT THE PORT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

LUIS ALVARO CEBALLOS (Y ARBOLEDA)

vs.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service at the Port of New York

DOCKET ENTRIES

Basis of Action: To set aside order of deportation

(Violation 5th Amendment to U. S. Constitution, etc.)

* * *

Date	*Filings—Proceedings*

Mar. 18-55. Filed Complaint and Issued Summons.

Mar. 23-55. Filed summons and return, served deft. 3-21-55.

Mar. 18-55. Filed affidavit and notice of motion to enjoin deportation pending determination—ret. 3-29-55.

Mar. 29-55. Filed affidavit and notice of motion to dismiss—ret. 3-31-55.

Apr. 15-55. Filed Opinion No. 21,843 and judgment. Motion to dismiss granted—So ordered—I. R. Kaufman, J.—Mailed notice of entry 4-15-55.

Apr. 20-55. Filed judgment dismissing complaint—I. R. Kaufman, J.—Mailed notice of entry 4-21-55.

Apr. 20-55. Filed plaintiff's notice of appeal—Mailed copy to U. S. Atty. 4-21-55.

Apr. 21-55. Filed affidavit and notice of motion to stay deportation pending determination of appeal—ret. 4-26-55.

Apr. 26-55. Memo endorsed on motion filed 4-21-55—Consented to—Settle order—Weinfeld, J.

Apr. 27-55. Filed consent and order staying deportation pending determination of appeal—Weinfeld, J.—Mailed notice of entry 4-28-55.

May 27-55. Filed stip. and order extending time to file appeal record to 7-6-55—Dawson, J.

[fol. 2] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

LUIS ALVARO CEBALLOS (Y ARBOLEDA), Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service at the Port of New York, Defendant.

COMPLAINT—FILED MARCH 18, 1955

The plaintiff by his attorneys, Blanch Freedman & Gloria Agrin, complaining of the defendant alleges:

1. This complaint is filed pursuant to the provisions of Section 1009 of Title 5 of the U. S. C. A. and Section 1329 of Title 8, U. S. C. A.

2. The defendant is the District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, which embraces the judicial district of the Southern District of New York, and as such he is the agent and representative, in the said immigration district, of the Attorney General of the United States and the Commissioner of Immigration and Naturalization, and is the highest official in charge of the said Service in the said immigration district.

[fol. 3] 3. The defendant is duly authorized and duly delegated in his said official capacity to administer and carry into effect, in the said immigration district, the provisions of the immigration laws, and more (2) particularly § 19(c)(2) of the Immigration Act of 1917, as amended, formerly 8 U. S. C. A. § 155(c), and the rules and regulations promulgated thereunder and to effectuate, in said third district, orders of deportation.

4. The plaintiff, an alien 41 years of age, was born in Colombia, South America. He is married to a native born United States citizen, has two citizen children with whom he

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* All figures in parentheses indicate the number of each new page of the paper filed in this Court as part of the Record on Appeal.

lives and all of whom are completely dependent upon him for their support, maintenance and care.

5. Plaintiff first entered the United States on February 24th, 1942 and last entered the United States on April 2, 1951. He has resided here continuously since said last entry.

6. On April 23, 1951, plaintiff was served with a warrant of arrest for deportation, issued by the defendant herein, charging him with being in the United States in violation of the Immigration Act of 1924 in that after his admission into the United States on a transit visa he failed to maintain said transit status.

7. Thereafter, in 1951, plaintiff made timely application for suspension of deportation pursuant to the provisions of § 19(c) of the Immigration Act of 1917 as amended (formerly 8 U. S. C. A. 155 (c)), on the ground that his deportation would result in a serious economic detriment to his citizen wife and citizen minor children.

8. Hearings on the warrant charge and on the application for suspension of deportation were held pursuant to [fol. 4] Title 8 of the Code of Federal Regulations 1951 Supplement, part 151.

(3) 9. On January 25, 1954, plaintiff's application for suspension of deportation was denied on the sole ground that he was statutorily ineligible therefor and his deportation was ordered on the charge set forth in the warrant of arrest.

10. Plaintiff, thereupon appealed from the aforesaid order to the Board of Immigration Appeals; said appeal was dismissed by the Board on October 19, 1954 and plaintiff's motion to reconsider was denied by the Board on February 17, 1955.

11. That the aforesaid order of January 25, 1954 is a final order in an administrative proceeding: a deportation proceeding by an administrative agency, to wit, the Immigration and Naturalization Service and the same is an order to be effectuated by the defendant herein.

12. By letter dated March 9, 1955 defendant ordered plaintiff to depart from the United States on or before April 11, 1955.

13. Upon information and belief, upon his failure to so

depart the defendant will take plaintiff into custody on a warrant of arrest for deportation based upon defendant's aforesaid order of January 25, 1954, and plaintiff will be deported.

14. The aforesaid order of January 25, 1954 is illegal; the finding therein that plaintiff is statutorily ineligible for suspension of deportation under Section 19(c) of the Act of 1917 in that he is ineligible for citizenship under Section 3(a) of the Selective Service Act (4) of 1940, is contrary to law; Section 3(a) of the Selective Service Act of 1940 [fol. 5] as here construed and applied is unauthorized by said law and is in conflict with judicial interpretation thereof; the said holding of plaintiff statutorily ineligible for suspension of deportation as aforesaid, unlawfully deprived plaintiff of his rights and privileges under the statute and unlawfully prevented any exercise by the Attorney General of his discretion in considering and determining plaintiff's application for suspension of deportation.

15. The said order of deportation is void, illegal and unlawful in that (1) the deportation hearings and procedures had therein on which the said order is based did not comport with the minimum standards for a fair and impartial hearing, denying to plaintiff due process of law, contrary to and in violation of the Fifth Amendment to the Constitution of the United States; and (2) the said hearings and deportation procedures on which said order is based did not comply with the provisions of the Administrative Procedure Act of 1946 or the conditions established by law essential to a fair hearing by an administrative agency.

Wherefore, plaintiff asks the judgment of this Court that:

1. A declaratory judgment be made and entered declaring:

a) plaintiff is not barred from United States citizenship under Section 3(a) of the Selective Service Act of 1940.

b) plaintiff is statutorily eligible under Section 19 (c) of the Immigration Act of 1917, as amended (formerly 8 U. S. C. A. 155) for suspension of deportation.

c) the order of January 25, 1924 to be unlawful.

2. An order be made and entered herein setting aside the order of January 25, 1954, the findings and conclusions therein contained as arbitrary and not in accordance with law.

[fol. 6] 3. An order be made and entered herein directing the defendant to process, consonant with law and in (5) accordance with the mandate of this Court, plaintiff's application for suspension of deportation.

4. An order be made and entered enjoining and restraining the defendant from deporting, executing or taking any other action in pursuance or by virtue of the order herein dated January 25, 1954.

5. For such other and further relief as to this Court may deem just and proper in the premises.

Pending the hearing and determination of this action, plaintiff prays for the issuance of an order enjoining and restraining the defendant from deporting plaintiff or otherwise proceeding with his deportation under said order of January 25, 1954 and for such other necessary and appropriate relief as may be required to preserve the status or rights of the parties hereto pending the conclusion of this action.

Dated: New York, N. Y., March 18, 1955.

Blanch Freedman & Gloria Agrin, Attorneys for Plaintiff, Office & P. O. Address, 220 Broadway, New York, N. Y.

[fol. 7] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PLAINTIFF'S NOTICE OF MOTION FOR TEMPORARY INJUNCTION—FILED MARCH 18, 1955

Sir:

Please take notice that upon the annexed affidavit of Luis Alvara Ceballos, plaintiff above named, duly verified the 18th day of March 1955, and upon the complaint filed herein, a copy of which is hereto attached and upon all the

proceedings heretofore had herein before the Immigration and Naturalization Service, the undersigned will move this Court at a motion term thereof, to be held in the United States Court House at Foley Square, New York, N. Y. in Room 506 thereof on March 29th, 1955, at 10:00 A.M. on that date, or as soon thereafter as counsel can be heard, for an order enjoining and restraining the defendant, pending the hearing and determination of the suit herein, from deporting plaintiff or otherwise proceeding with his deportation under the order of deportation herein dated January 25, 1954, and for such other necessary and appropriate relief as may be required to preserve the status or rights of the parties hereto pending the conclusion of said suit.

Dated: New York, N. Y., March 18th, 1955.

Yours, etc., Blanch Freedman & Gloria Agrin, Attorneys for Plaintiff, Office & P. O. Address: 220 Broadway, New York, N. Y.

[fol. 8] PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

[Title omitted]

STATE OF NEW YORK,
County of New York, ss.:

LUIS ALVARO CEBALLOS being fully sworn deposes and says:

I am the plaintiff in the above entitled action and am the subject of a final order of deportation. I submit this affidavit in support of the annexed notice of motion for an order enjoining and restraining the defendant herein from deporting me, pending the determination of this suit.

The action herein is brought pursuant to 5 U. S. C. A. § 1009 and 8 U. S. C. A. § 1329 and challenges the legality of the said order of deportation against me. Judgment is asked (1) declaring that under Section 3(a) of the Selective Service Act of 1940 I am not barred from United States citizenship; that under Section 19(c) of the 1917 Immigra-

tion Act, as amended, I am statutorily eligible for suspension of deportation; and that the order of deportation [fol. 9] against me is unlawful; (2) setting aside the deportation order; (3) directing defendant (8) to process my application for suspension in accordance with law and (4) enjoining and restraining defendant from deporting me under the said order of deportation against me.

The defendant has advised me by letter (a photostatic copy of which is attached hereto and marked Exhibit A), that I must depart from the United States by April 11, 1955. I have further been advised and verily believe that upon my failure to so depart, the defendant in pursuance of the order of deportation herein will cause me to be apprehended and deported. Unless such action is stayed by this Court, this action with the rights dependent thereon will be mooted and I and my family will suffer irreparable injury and be deprived of the inestimable right and privilege to live in the United States. On the other hand, as will be seen from the facts in the case, the granting of the stay herein pending the conclusion of my suit in no way affects adversely the defendant; it neither impairs any interests of the United States Government, nor does it impose upon it any undue inconvenience.

I am now 42 years of age; I was born in Colombia, South America and I am a subject of that country. I am married to an American born citizen wife and am the father of two native born children aged 3½ and 1¾ years. I live with my wife and children in a home of our own at 15 Crestwood Lane, New Rochelle, New York. I am the president of Ceballos Bros., Inc., an export-import business with offices at 150 Broadway, New York, N. Y. (9) My wife and children are completely dependent upon me for support and maintenance.

I last entered the United States with my wife, by plane on April 2, 1952, on a transit visa, enroute to Mexico. In the interim, my wife, who was pregnant, became extremely ill; her health forbade traveling and she wanted to remain [fol. 10] in the United States, her native homeland. We have lived here ever since.

On or about April 23, 1951, I voluntarily went to the office of the defendant, the Immigration and Naturalization

Service at 70 Columbus Avenue, New York, N. Y., to adjust my status in the United States under the immigration law (former Section 155 of 8 U. S. C. A.). A warrant of arrest for deportation issued on the charge of my having failed to maintain my transit status. I thereupon made application for suspension of deportation. Hearings were held and on January 25, 1954 the hearing officer found me deportable as charged and denied my application for suspension:

> "The bar to his being granted Suspension of Deportation or Pre-examination so that he could obtain a visa is the fact that he, on August 26, 1943, signed DSS form 301, 'Application by Alien for Relief from Military Service.'"

The Board of Immigration Appeals dismissed my appeal from the Hearing Officer's order on October 19, 1954. My motion to the Board to reconsider was denied February 17, 1955.

The facts concerning my eligibility for suspension are as follows. I had been lawfully admitted to the United States for permanent residence on February (10) 24th, 1942. It was the time of World War II and within three months of my admission I duly registered with the Local Draft Board, No. 40, in New York City as required by the Selective Service Act. I executed questionnaire designated DSS Form 40. Thereafter, in the same year—1942—I appeared in person at the Local Board on two occasions: first, to file a change of residence and thereafter in July 1942 to report the loss of my registration card and apply for a duplicate. (I had not as yet been classified or examined.) On the latter occasion I discussed with the Board the feasibility of my being [fol. 11] placed in a Colombian or other Latin American Group, that I heard the United States Army was in the process of organizing. The Local Board advised me that my preference would be considered and in due time I would hear from them.

However, I did not hear from the Local Board until almost a year later. In June 1943 I received in the mail from the Local Board two sets of forms: DSS 304 "Alien's Personal History and Statement" and DSS 302 "Application for Determination of Residence."

I took the forms to my Local Draft Board and in connection with the execution of Form 304 I again discussed the possibility of getting into the Colombian Group. I was thereupon advised to insert the word *"do"* in item No. 41 of form 304 which made the printed item read:

> "I *do* [written in] object to service in the land and naval forces of the United States."

This was represented to me to be the mechanics employed to give consideration to my request for assignment to a Latin American or Colombian Group in the United States Armed (11) Forces. Whether I would be so assigned was a matter to be determined by the Selective Service authorities, of which they said I would be notified.

In connection with item No. 41, above mentioned, there appeared the following notice:

> " * * * If you are a citizen or subject of a neutral country and you do not wish to serve in the land or naval forces of the United States, *you may apply to your Local Board for an application* by alien *for relief from military service.* (Form 301) which, when executed by you and filed by the Local Board, will relieve you from the obligation to serve in the land and naval forces in the United States, but will also debar you from thereafter becoming a citizen of the United States." (Emphasis added.)

[fol. 12] I did not then or at any other time apply for or request such a form.

Two months later, August 1943, I received in the mail from my Local Board, unsolicited by me, a set of forms that were completely filled out—presumably by the Board—with instructions to sign and return to them. This was the same DSS form 301 "Application for Relief from Military Service."

I took the forms to my Local Board and after discussion with them, I was instructed to sign the form as prepared by the Board in order to have my request to be assigned if possible to a Colombian Group. I thereupon signed the form and returned home to await notification as to my specific service assignment in the U. S. Army.

I did not know then, nor did I know for many years thereafter, that the form 301 I had signed was an application to be relieved from military service. (12) The fact is that I was never classified 4C (the classification of relief from service based on form DSS 301). On the contrary, I was classified 1A and in January 1944 instructed by my Local Board to appear for induction. I did appear as directed and after physical examination was rejected because of a chronic kidney ailment (nephritis) and reclassified 4F.

I never sought nor wanted relief from military service and in truth was never so relieved. In the first place, I never knew myself to be or considered myself in 1943 to be a neutral alien. I was a citizen of Colombia and knew from my own knowledge and experience that Colombia was actively engaged in the allied cause from the moment Pearl Harbor occurred. Colombia broke off relations with Japan on December 8, 1941; with Germany and Italy on December 9, 1941; with Vichy France, November 26, 1942 (see World Almanac, 1949 Edition, p. 322). In the second place, I never applied or asked for form 301. Sent to me as it was—unsolicited and fully filled out—there was nothing to alert me [fol. 13] that it would serve a purpose other than had been represented to me by the Board: to consider an assignment for me in a Latin Group within the United States Army.

I have since learned, through an examination of my Selective Service Record on file in New York City, that the form 301 was sent to me because of a confusion that existed in the Local Board's mind as to my status. This is revealed by two letters contained in my file dated (1) June 19, 1943 from Local Board 40 to Selective Service Headquarters in Washington, D. C., and (2) letter dated July 28, 1943 from Selective Service Headquarters to Local (13) Board 40.

The sequence of events is as follows:

On June 16, 1943 I filled out forms 302 and 304 (see supra, p. 4).

On June 19, 1943 my Local Board sent my file to Selective Service Headquarters in Washington, D. C. with the request that they determine my status and inductibility.

On July 28, 1943 the Selective Service Headquarters in

Washington, D. C. returned my file to my Local Board with an answering letter as follows:

> "Review of the file discloses that the registrant is a citizen of Colombia, South America and a non-declarant alien. He entered the United States on February 24, 1942 and filed his questionnaire on May 28, 1942. D.S.S. Form 302 was filed on June 16, 1943, but cannot be processed since it was not filed within 3 months of alien's entry into the United States or, in the alternative, within 3 months of the date on which he became liable for service.
>
> "It is our opinion that the registrant should be considered 'a male person residing in the United States' and processed accordingly.
>
> [fol. 14] "We note from the alien's personal history and statement (D.S.S. Form 304) that the registrant states he objects to service in U.S. armed forces. We point out therefore, that as a citizen of Colombia, which is a neutral country, the registrant may file a D.S.S. Form 301 at any time prior to his induction."
>
> Signed, A. Kaufman
> Major, Infantry Chief Maintenance
> & Operations
> For the New York City Director

Instead of processing me as directed by headquarters as "a male person residing in the United States" and classifying me accordingly, they took it upon themselves to send me Form 301, which I signed, as stated above, in the belief that it was to serve to facilitate an assignment (Latin Group) for service in the U. S. Army and not for relief from service.

In the third place, I was never exempted from training and service. I was never classified 4C as a result of having signed Form 301. I remained fully subject to training and service and was not relieved of service.

Under these circumstances, I submit the signing of Form 301 cannot be held to forever debar me from United States citizenship and the order of deportation and finding that I am statutorily ineligible for suspension of deportation is

incorrect. The issue before this Court is a substantial one of extraordinary consequence to me and my citizen family.

Wherefore, I respectfully pray that this motion for a stay of deportation pending the determination of the action herein be granted—for all of which no previous relief has heretofore been granted.

(S) Luis Alvaro Ceballos

(Sworn to by plaintiff on March 18, 1955.)

[fol. 15] EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT OF PLAINTIFF

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service
70 Columbus Avenue, New York 23, New York
March 9, 1955

Please refer to this
File No.: A7 662 411 DDPB

Mr. Luis Alvaro Ceballos Arboleda
3725 Henry Hudson Parkway
New York, New York

Dear Sir:

Reference is made to your immigration proceedings pending before this Service and recent request for an extension of time within which to depart voluntarily from the United States.

You are hereby informed you will be granted an extension of thirty days from date of notification or until April 11, 1955 within which to depart from the United States voluntarily at your own expense, conditioned upon arrangements being made with this office for verification of your departure.

You are requested to inform this office at least five days in advance the date, port and manner in which you intend to leave the United States, so that your departure may be

witnessed by an officer of this Service and your case closed. In the event there is a delivery bond outstanding in your case, you are warned that to expedite cancellation of this bond you must inform this office in advance of the facts of your departure. You are further warned that you may experience difficulty and delay if you leave the United States without your security and try to repossess or convert it abroad.

[fol. 16] Please be advised on your motion for reconsideration the Board of Immigration Appeals on February 17, 1955 ordered that motion for reconsideration be and the same is hereby denied.

Very truly yours, Edw. J. Shaughnessy, District Director, New York District, by: A. J. Salturelli, A. J. Salturelli, Chief Parole Section.

cc: Blanch Freedman, Esquire, 220 Broadway, New York, New York.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DEFENDANT'S NOTICE OF MOTION TO DISMISS COMPLAINT—FILED MARCH 29, 1955

MESDAMES:

Please take notice that upon the annexed affidavit of Lester Friedman, Esq., duly verified, and upon the record of the administrative proceedings had herein, the undersigned, as attorney for the defendant will move this Court [fol. 17] at a term for the hearing of motions at the United States Court House, Foley Square, New York, N. Y., Room 506, on March 31, 1954 at 10 a.m. on that date or as soon thereafter as counsel can be heard for an order dismissing the complaint herein pursuant to Rule 12 F.R.C.P., on the grounds that the defendant is not a proper party hereto, that an indispensable party has not been named herein, that the form of remedy is not appropriate for the relief

sought and for failure to state a claim upon which relief may be granted.

Yours, etc., J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant.

To: Blanch Freedman & Gloria Agrin, Esqs., Attorneys for Plaintiff, 220 Broadway, New York, N. Y.

[fol. 18] AFFIDAVIT OF LESTER FRIEDMAN IN SUPPORT OF MOTION TO DISMISS COMPLAINT

[Title omitted]

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss.:

LESTER FRIEDMAN, being duly sworn deposes and says, that he is an attorney in the office of the District Counsel, Immigration and Naturalization Service, Department of Justice and, as such, is familiar with the administrative proceedings heretofore had herein.

There is incorporated herein by reference the administrative record of the deportation proceedings which plaintiff seeks to review. The said record will be handed up to this Court as an exhibit at the time of argument. The said record contains the complete administrative proceedings which culminated in a finding that plaintiff is subject to deportation but may be permitted to depart voluntarily in lieu of deportation provided he departs from the United States on or before April 11, 1955. The said record also contains the decision of the Board of Immigration Appeals dated October 19, 1954, wherein a final finding of deport-
[fol. 19] ability was made, and which discusses at length the various factual questions and legal issues involved in the case. For this reason, the facts will not be recited herein at length.

(26) Briefly plaintiff came to the United States as an alien in transit to another country and was admitted tem-

porarily for that purpose. He failed to depart and deportation proceedings were instituted on April 23, 1951. He was accorded several hearings in the course of which he conceded deportability but made application for the discretionary privilege of suspension of deportation under 8 U. S. C. 155(c).

The only issue which was raised in the administrative proceedings was the problem of whether plaintiff was eligible for the relief for which he applied. The issue arose because plaintiff had been residing in the United States as a resident during World War II and he then filed a questionnaire with his local Draft Board wherein he stated that he did not wish to serve in the Armed Forces. He thereafter executed a formal application to be relieved from service as a neutral alien. Such application, under the usual circumstances would have the legal effect of barring the applicant from naturalization under Section 3(a) of the Selective Service Act of 1940. Needless to say, plaintiff had the burden of establishing his statutory eligibility for suspension of deportation, one of the statutory requisites being eligibility to citizenship.

Plaintiff attempted to establish extenuating and unusual circumstances which, if believed, would afford him some basis for claiming that his application for exemption was based upon a misunderstanding and therefore not binding upon him. However, as pointed out by the Board of Immigration Appeals his explanation was not believed. His testimony contained numerous discrepancies including a false (27) statement that he had at one time made denying that he even executed such an application. In addition his testimony was inherently improbable, if not fantastic. [fol. 20] Thus, on the basis of the evidence of record the Board decided the question of credibility adversely to the plaintiff and ruled that he was bound by his voluntary execution of an application for exemption from military service.

Notwithstanding the denial of suspension of deportation to plaintiff, he was granted a lesser form of discretionary relief, that is voluntary departure in lieu of deportation, for which the requisite of eligibility to citizenship is not contained in the statute.

The first ground for the dismissal of the complaint herein, as urged by the defendant, is that the defendant is not a proper party. In this connection it should be noted that the District Director did not make any of the adjudications which are now sought to be reviewed. Nor did the said District Director make the final order of deportation dated October 19, 1954; the latter decision was made by the Board of Immigration Appeals acting for the Attorney General of the United States. What is most important is that the plaintiff has not been ordered deported; he has been granted voluntary departure in lieu of deportation. Thus the District Director has neither issued a warrant for plaintiff's deportation nor is he now threatening to execute such a warrant. It is therefore apparent that no justiciable controversy exists between the plaintiff and the defendant. Although the Hearing Officer in this case was subject to certain administrative supervision by the (28) defendant he was not and is not subject to his direction or control with respect to the decision which was made. As a matter of fact, the District Director has the same right to appeal if he disagrees with a Hearing Officer's decision as has the alien involved.

In view of the foregoing we respectfully submit that only the Attorney General of the United States for whom the Board of Immigration Appeals acted is a proper party hereto and that the Attorney General is an indispensable party. Nor can the complaint herein be amended to in-
[fol. 21] clude the Attorney General since this Court has no jurisdiction over the said official whose official residence is Washington, D. C. We respectfully submit that the case of Vaz v. Shaughnessy, 208 F. 2d 70, is dispositive of the question of parties. Although the Court of Appeals in this Circuit reached a contrary conclusion in the recent case of Pedreiro v. Shaughnessy, 213 F. 2d 768, the latter case distinguished the Vaz case and did not overrule it. The instant case is amazingly parallel to the Vaz case; both involve issues of discretionary relief from deportation which are vested by statute within the power of the Attorney General to grant or deny. Another distinguishing feature between the Pedreiro case and this case is the fact that Pedreiro was about to be deported by the District Director

and such deportation was sought to be enjoined. Here the alien has not been ordered deported and no action is now contemplated by the District Director, unless plaintiff fails to depart voluntarily, a question which has not yet arisen and may never arise. (29) In any event certiorari has been granted by the United States Supreme Court in the Pedreiro case both on the question of proper parties as well as the form of remedy which we will discuss below.

The next ground urged by defendant for dismissing the complaint herein is that the form of remedy is not proper. In this connection we rely on the leading decision of the United States Supreme Court in *Heikkila* v. *Barber*, 345 U. S. 229. The theory of the latter case was that the Immigration law, prior to the effective date of the Immigration and Nationality Act, provided that the decision of the Attorney General shall be final. Here the proceedings were conducted and the orders made under the same Act which was construed in the Heikkila case. We accordingly submit that the conflict which has arisen between Circuits as to the form of remedy which is now authorized by the Immigration and Nationality Act is not an issue in this case (see Pedreiro v. Shaughnessy, cited above, cert. granted [fol. 22] and Batista v. Nicolls, 213 F. 2d 20, wholly to the contrary).

Notwithstanding the technical deficiencies in the complaint herein we would prefer a decision on the merits. This is an action for review of an administrative proceeding which is now before this Court. The principal issue, on the administrative level, was one of fact. As to this issue plaintiff submitted nothing but his self-serving declarations claiming extenuating circumstances under which he applied for exemption from military service. The administrative authorities declined to believe him and attached no credence to his testimony. We respectfully submit that this Court may not substitute its judgment for plaintiff's credibility for that vested by statute in the Executive branch of the (30) Government. Even in judicial proceedings "the mere say-so of interested witnesses does not have to be accepted" (*Flynn ex rel. Yee Suey* v. *Ward*, 104 F. 2d 900-902; see also *Lew Wah Fook* v. *Brownell*, C. A. 9, January 14, 1955, not yet reported).

The record herein amply demonstrates that the plaintiff was afforded a fair administrative hearing wherein substantial evidence supported the administrative findings and wherein no error of law was made. For this reason no basis for judicial intervention exists and no claim can be asserted by the plaintiff justifying judicial intercession.

WHEREFORE it is respectfully prayed that the complaint herein be dismissed on the merits, pursuant to Rule 12(b) F. R. C. P. and on the further grounds that the defendant is not a proper party, that an indispensable party has not been named and that the form of remedy is inappropriate.

Lester Friedman

(Sworn to by Lester Friedman on March 29, 1955.)

[fol. 23] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

LUIS ALVARO CEBALLOS (Y ARBOLEDA), Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service at the Port of New York, Defendant.

OPINION OF KAUFMAN, D.J.—April 15, 1955

Appearances:

Blanch Freedman & Gloria Agrin, Attorneys for Plaintiff.

J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant.

Harold J. Raby, Assistant United States Attorney.

Lester Friedman, Attorney, Immigration and Naturalization Service, of Counsel.

IRVING R. KAUFMAN, D.J.

This action has been brought pursuant to Section 10 of the Administrative Procedure Act, 5 U. S. C. Sec. 1009, and the general jurisdictional provision of the Immigration and Nationality Act of 1952, 8 U. S. C. Sec. 1329, to

[fol. 24] review the (32) administrative proceedings of the Immigration and Naturalization Service wherein plaintiff was found deportable but was permitted to depart voluntarily in lieu of deportation. The motion now before the Court is one by the defendant [1] to dismiss the complaint:

(1) for failure to state a claim;

(2) for failure to name an indispensable party—i.e. the Attorney General of the United States and/or the Commissioner; and

(3) for failure to pursue the proper form of remedy (contended to be habeas corpus).

Plaintiff a subject of Columbia, last entered the United States on April 2, 1951, on a temporary visa, en route to Mexico. He has remained here ever since. A warrant of arrest for his deportation issued on April 23, 1951 for his failure to maintain transit status. Thereupon, he applied for suspension of deportation. Hearings were held, and on January 25, 1954, the hearing officer found plaintiff to be deportable and denied his application for suspension of deportation on the ground that he was statutorily ineligible for such relief because of his voluntary execution of an application for exemption from military service under Section 3(a) of the Selecive Service Act of 1940. (33) On October 19, 1954, the Board of Immigration Appeals dismissed plaintiff's appeal from the hearing officer's order on the ground that plaintiff had voluntarily and knowingly executed the application for exemption from military service, and thus was statutorily ineligible for suspension of de-[fol. 25] portation. This action against the District Director was instituted shortly after the Board's denial of plaintiff's request for reconsideration on February 17, 1955.

The primary attack of the plaintiff in this action is upon the finding that he is statutorily ineligible for the discretionary relief of suspension of deportation. The relief

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[1] The plaintiff moved before this Court for an order restraining the defendant from deporting him pending the determination of this motion. Upon the representation of counsel for the defendant that no action against the plaintiff would be taken, the plaintiff withdrew the application.

requested in the complaint is a judgment declaring the plaintiff to be statutorily eligible for suspension of deportation, an order setting aside, and restraining the defendant from executing, the final order of the Board, and an order "directing the defendant to process * * * in accordance with the mandate of this Court, plaintiff's application for suspension of deportation."

In light of the relief requested in the complaint, the Court deems the second ground urged by the defendant District Director to be dispositive of the issues in the case. Although there has been judicial criticism directed at the cases holding a superior officer to be an indispensable party in litigation against the Government, the Court is constrained by precedent to hold that the Attorney General and/or the Commissioner are indispensable parties to the instant action.

(34) In *Vaz* v. *Shaughnessy*, 208 F. 2d 70 (C. A. 2, 1953), the Court of Appeals for this Circuit held that the Attorney General and/or the Commissioner of Immigration are indispensable parties to an action to review an adverse holding of the Board with respect to an application for suspension of deportation. The basis for the *Vaz* holding was characterized by the Court of Appeals in *Pedreiro* v. *Shaughnessy*, 213 F. 2d 768, 769 (C. A. 2, 1954) as involving "an attempt by a concededly deportable alien to review an order holding him not eligible for suspension of deportation, essentially a discretionary matter * * *". *Pedreiro*, which distinguished *Vaz* on the aforementioned basis, held that the Attorney General and/or the Commissioner of Immigration are not indispensable parties to an action to re- [fol. 26] view a deportation order solely on the ground that the *findings of deportability* were unconstitutional. No application for suspension of deportation was involved.

Both *Pédreiro* and *Vaz* are grounded upon the basic criteria for determining the indispensability of a superior officer declared by the Supreme Court in *Williams* v. *Fanning*, 332 U. S. 490 (1947). "[T]he superior officer is an indispensable party if a decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." 332 U. S. 490, 493. On the other hand,

the superior is not indispensable "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is (35) before the court." *Id.* at 494. *Vaz* and the instant case involve relief against the Attorney General with respect to the discretionary power of suspension of deportation. *Effective* relief cannot be granted merely by preventing the District Director from deporting an admittedly deportable alien. Compelling exercise of the discretionary power to suspend deportation is the *sine qua non* of effective relief in this situation. Without compelling the Attorney General to exercise such discretion, the plaintiff will continue in the status *ad infinitum* of an alien clearly deportable for failure to continue in transit to Mexico. The District Director can never alter plaintiff's status as an admittedly deportable alien; only the Attorney General, *notwithstanding such deportability*, can suspend his deportation. Petitioner recognizes that this uncertain status without more is unsatisfactory for in his prayer for relief in this action he asks that "An order be made and entered herein directing the defendant to process, consonant with law and in accordance with the mandate of this Court, plaintiff's application for suspension of deportation" which order of suspension can be granted only by the Attorney General. See also *Savala-Cisneros* v. *Landon*, 111 F. Supp. 129 (S. D. Cal. [fol. 27] 1953); *Chavez* v. *McGranery*, 108 F. Supp. 255 (S. D. Cal. 1952). On the other hand, *Pedreiro* does not involve an appeal to higher authority. Pedreiro was not requesting a favor which only the Attorney General could grant; his claim was that he had a *right* (36) to remain on our shores because he was not deportable *in the first instance*. See *Gong Poy* v. *Sahli*, 125 F. Supp. 740 (N. D. Ill. 1954). Even his claim may eventually have to be litigated in the nominal presence of the Attorney General: at this date, the Third Circuit and other courts [2] require him

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[2] *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3, 1950); *Slavik* v. *Miller*, 184 F. 2d 575 (C. A. 3, 1950); cert. denied, 340 U. S. 935 (1951); *Paolo* v. *Garfinkel*, 200 F. 2d 280 (C. A. 3, 1952); *Belizaro* v. *Zimmerman*, 200 F. 2d 282 (C. A. 3, 1952); *Rodriguez* v. *Landon*, 212 F. 2d 508 (C. A. 9, 1954).

to be present in some form, neither physical nor spiritual, and the Supreme Court has granted certiorari in *Pedreiro*, 75 S. Ct. 124 (Nov. 25, 1954).[3]

Motion to dismiss granted. So ordered.

Dated: New York, N. Y., April 15, 1955.

Irving R. Kaufman, U. S. D. J.

[fol. 28] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

LUIS ALVARO CEBALLOS (Y ARBOLEDA), Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service at the Port of New York, Defendant.

ORDER AND JUDGMENT OF DISMISSAL OF COMPLAINT—April 20, 1955

At New York, New York, in said District on the 19th day of April, 1955.

The plaintiff having filed a complaint against the defendant for judgment pursuant to 5 U. S. C. A. 1009 and 8 U. S. C. A. 1329, declaring plaintiff statutorily eligible for suspension of deportation; setting aside as invalid the final order of deportation against him and directing defendant to process, consonant with law and in accordance with the mandate of this Court, plaintiff's application for suspension of deportation; and the plaintiff having moved by notice of motion dated March 16, 1955 for an order enjoining

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[3] Perhaps the Supreme Court will utilize this opportunity to thoroughly re-examine the policy basis for the standards it set forth in *Williams*, in light of the many persuasive arguments for modification offered by some courts and writers. *E. G. Hart & Wechsler, The Federal Courts and the Federal System* (1953, 1189; *Note*, 54 *Colombia Law Rev.* 1128 (1954); *Pedreiro*, supra, at 770.

and restraining the defendant, pending the hearing and determination of his suit herein, from deporting him under said order of deportation and the defendant having cross moved with respect to the complaint by notice of motion dated March 29, 1955 for an order pursuant to Rule 12 of the Federal Rules of Civil Procedure dismissing the complaint (1) for failure to state a claim upon which relief may be granted; (2) for failure to name an indispensable (38) party (i.e., the Attorney General and/or Commissioner [fol. 29] of Immigration); and (3) in that the plaintiff's form of remedy is inappropriate for relief; and the said motions having come on to be heard before the court on March 31, 1955 and the court having rendered a decision on April 15, 1955 dismissing the complaint on the sole ground that the Attorney General and/or Commissioner of Immigration is an indispensable party, and ordering the complaint herein dismissed; Now in accordance with said decision, it is

Ordered and Adjudged that the above entitled complaint be and it hereby is dismissed; and it is

Further ordered and adjudged that the plaintiff's motion for a temporary injunction be and it hereby is denied.

Irving R. Kaufman, U. S. D. J.

The foregoing order is consented to as to form, and notice of settlement is hereby waived, this 19th day of April, 1955.

J. Edward Lumbard, H. J. R., U. S. Attorney, Southern District of New York, Attorney for Defendant.

Judgment entered.

William V. Connell, Clerk.

April 21, 1955.

[fol. 30] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PLAINTIFF'S NOTICE OF APPEAL—April 20, 1955.

Sir:

Please take notice that the plaintiff above named hereby appeals to the United States Court of Appeals for the Second Circuit from the final order and judgment dismissing the complaint in the above entitled action and denying plaintiff's motion for temporary injunction made and entered herein respectively on April 15, 1955 and April 19, 1955.

Dated: New York, N. Y., April 20, 1955.

Yours, etc., Blanch Freedman & Gloria Agrin, Attorneys for Plaintiff, Office & P. O. Address: 220 Broadway, Manhattan.

To: Hon. J. Edward Lumbard, Esq., United States Attorney for the Southern District of New York, Attorney for Defendant, Office & P. O. Address: United States Court House, Foley Square, New York, N. Y.

[fol. 31] U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE NEW YORK, N. Y.

[Title omitted]

TRANSCRIPT OF HEARING OF JULY 31, 1951 BEFORE IMMIGRATION AND NATURALIZATION SERVICE

File No. 0300-112629, C. O. No. A-7662411, Hearing Officer: Aaron I. Maltin, Stenographer: John Yonke, Interpreter: None, Language: English, Hearing conducted at 70 Columbus Ave., N. Y. C. 23, N. Y.

Date: July 31, 1951.

COUNSELS:

Carol King, Esq., 220 Broadway, N. Y. C., N. Y., James O. Berlinger, Esq., 220 Broadway, N. Y. C., N. Y.

[fol. 32] Hearing Officer to Respondent:

Q. What is your name?

A. Luis Alvaro Ceballos Arboleda.

Q. Will you please stand and raise your right hand and be sworn. Do you solemnly swear that all the testimony you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A. Yes, sir.

Q. You are informed that this hearing is being given to you in order to determine your right to be and remain in the United States and to give you an opportunity to show why you should not be deported from the United States. Do you understand?

A. Yes.

Q. Are these your attorneys who are here with you?

A. Yes, they are.

Hearing Officer to Counsels:

Will you both please identify yourselves for the record.

By Counsels:

Carol King, 220 Broadway, New York City 7. Telephone (2) number, Cortland 7-3318. Admitted to practice before the Immigration Service and the Board of Immigration Appeals.

James O. Berlinger, 220 Broadway, New York, N. Y., Cortland 7-6960. Application for admission pending.

Hearing Officer to Counsels:

There is no objection to both counsels representing the respondent. However, it would be best if one should speak during the course of the hearing. Will you designate who will speak.

[fol. 33] By Counsel (James O. Berlinger):

Mrs. King will act as counsel in the hearing in all matters.

Hearing Officer to Counsel (Carol King):

Are you ready to proceed?

By Counsel (Carol King):

Subject to certain preliminary motions, I am ready to proceed. Mr. Presiding Inspector, have you been appointed in accordance with the Administrative Procedures Act?

By Hearing Officer to Counsel:

I am a Hearing Officer and my appointment is under the ordinary Civil Service rules for the appointment of Hearing Officers in this Service.

By Counsel (Carol King):

I ask that you disqualify yourself in view of the decision of the United States Supreme Court in the case of Sung against McGrath, 339 U. S. 33, and the further opinion of Judge T. Allan Goldsborough in the case of Potash against the United States which was a decision without opinion on the eve of his death.

By Hearing Officer:

Your objections on those grounds are overruled.

By Counsel (Carol King):

(3) I further object to the Hearing Officer upon the ground that he is acting as judge and prosecutor, and that a one-man hearing is a violation of due process of law and in conflict of the Constitution.

[fol. 34] By Hearing Officer to Counsel:

Your objections on those grounds are likewise overruled.

Hearing Officer to Respondent:

Q. I have here a warrant of arrest issued by the District Director in New York on April 23, 1951, wherein it is charged that one Luis Alvaro Ceballos Arboleda who entered this country at New York by plane on April 2nd, 1951, is in the United States in violation of the immigration laws. I show you this warrant of arrest and ask if you are the person who is referred to in it?

A. I am.

Q. Was a copy of that warrant of arrest served on you on April 23, 1951?

A. Yes, it was served on April 23rd.

Q. You are at liberty now under a bond in the sum of $1,000.00; are you not?

A. Yes.

By Hearing Officer:

Copy of the warrant of arrest is entered into evidence as Exhibit No. 1.

Hearing Officer to Respondent:

Q. The charge in the warrant of arrest is that you have violated the Immigration Act of 1924, because after you were admitted as a transit you failed to maintain the status of a transit in the United States. Do you understand this charge?

A. I understand the charge.

Q. I have before me an affidavit which I show you and ask you if this is your signature contained thereon?

A. Yes.

Q. Do you recall signing and swearing to the contents of this document on April 20, 1951, in this building?

A. Yes, sir.

By Counsel:

(4) No objection.

[fol. 35] Hearing Officer:

Affidavit of respondent, dated April 20, 1951, is entered into evidence as Exhibit No. 2.

Hearing Officer to Respondent:

Q. I have before me a Form 257A, and ask you if you received this and two other copies of this Form from an American Consulate abroad?

A. Yes.

Q. And was this copy returned to you at the time of

your admission to the United States on April 2, 1951 by the immigration officer?

A. Yes.

By Hearing Officer:

There is before me, Form 257A bearing number V-499210, issued in the name of the respondent, and indicating his purpose and length of intended stay in the United States as transit to Mexico—29 days, and also indicating that he was admitted to the United States at New York on April 2nd, 1951 to April 23rd, 1951, by U. S. Immigrant Inspector J. G. Roche under Section 3(3) of the Immigration Act of 1924.

Hearing Officer to Respondent:

Q. Have you remained continuously in the United States since April 2, 1951?

A. Yes, sir.

Q. Prior to April 23, 1951, did you fill out a form asking for an extension of your temporary admission to the United States?

A. No, sir.

Q. Have you ever been arrested on any occasion for any violation of law?

A. No.

Q. I have before me a report from the Federal Bureau of Investigation showing no criminal record concerning you in this country. Do you understand?

A. Yes.

[fol. 36] By Hearing Officer:

(5) Report from the Federal Bureau of Investigation, dated April 23, 1951, is entered into evidence as Exhibit No. 3.

Hearing Officer to Respondent:

Q. Are you married?

A. Yes, sir.

Q. On how many occasions have you been married?

A. Well, I was married prior to this marriage.

Q. And then you were married twice?

A. Yes.
Q. How did your first marriage end?
A. In divorce.
Q. And when were you divorced?
A. On June 30, 1950.
Q. When were you married to your present wife?
A. January 3, 1951.
Q. Where?
A. New York City.
Q. Do you have any children?
A. From my previous marriage, three.
Q. Where do they reside?
A. They are residing in Mexico now.
Q. Are they all citizens of that country?
A. Yes, they are citizens of Mexico.
Q. Of what country is your present wife a citizen?
A. A citizen of the United States.
Q. Do you have any members of your immediate family in the United States besides your wife?
A. My brother, Carlos Ceballos; he is a visitor here. And I have a brother Salvador who is a legal resident of the United States.
Q. I presume your wife is here today and is prepared to testify as to her citizenship and to establish that she is married to you?
A. Yes, she is here.

Hearing Officer to Counsel:

(6) You may question the respondent if you wish.

[fol. 37] Counsel to Respondent:

Q. Mr. Ceballos, did you go to the Police Department, City of New York, and ask for and secure a police certificate?
A. Yes.
Q. Is this the police certificate that you secured?
A. That is the police certificate.

By Counsel:

I offer it in evidence but would like to retain the fingerprints in order to secure a Mexican police certificate which

I could not secure up until now because I wanted to keep the fingerprints for this hearing.

By Hearing Officer:

Certificate issued by the Police Department, City of New York, dated July 10, 1951, is entered into evidence as Exhibit No. 4.

Counsel to Respondent:

Q. Mr. Ceballos, where are you working at the present time?

A. Commodity Service Corporation, 67 Wall Street, New York City.

Q. Does this letter on the letterhead of the Commodity Service Corporation relate to your employment there?

A. Yes.

By Counsel:

I offer it in evidence.

By Hearing Officer:

Letter on the stationery of the Commodity Service Corporation, New York, N. Y., dated July 26, 1951, is entered into evidence as Exhibit No. 5.

[fol. 38] Counsel to Respondent:

Q. Who are the two officers besides yourself of the Commodity Service Corporation?

A. Mr. Edgar R. Molina and Mr. Sol Slotpole.

(7) Q. Did each of these officers execute a character affidavit in your behalf?

A. Yes, they have.

By Counsel:

I offer two character affidavits in evidence.

By Hearing Officer:

Affidavit of Edgar R. Molina and Sol Slotpole, both executed July 26, 1951, attesting to the good moral char-

acter of the respondent, is entered into evidence as Exhibit No. 6.

Counsel to Respondent:

Q. Mr. Ceballos, you testified that you are married. Is this your marriage certificate?
A. Yes, it is.

By Counsel:

I offer two photostatic copies of the marriage certificate in evidence, and offer the original for purposes of comparison.

By Hearing Officer:

Photostatic copy of Certificate of Marriage, issued by the City Clerk of the City of New York, January 3, 1951, certifying to the marriage of Alvaro Ceballos and Jacqueline Teresa Richot, is entered into evidence as Exhibit No. 7. Original compared and returned.

Counsel to Respondent:

Q. Mr. Ceballos, you testified that you had been previously married in Mexico. Is that correct?
A. Yes.
[fol. 39] Q. And that marriage was terminated by divorce?
A. Yes; correct.
Q. Is this the decree of divorce?
A. Yes, it is the decree of divorce.

By Counsel:

I offer two photostatic copies with certified translations thereof.

(8) By Hearing Officer:

Photostatic copy of document in the Spanish language, to which is attached an authentication by the American Embassy in Mexico, which document is a decree of divorce dated June 30, 1950, together with a certified translation

thereof, is entered into evidence as Exhibit No. 8. Original Spanish document and authentication compared and returned.

Counsel to Respondent:

Q. Mr. Ceballos, at the time that you signed Form 301, did you know that signing that form would interfere in any way with your becoming a citizen of the United States?

A. No.

Q. Will you state the circumstances under which you signed that form in so far as you can recall?

A. I went to my draft board and was presented with Form 301 for signature. At that time it was my understanding that it was a temporary deferment pending indication from the same draft board as to what would be the best choice for me as to whether I wanted to serve in the Colombian Army or the United States Army. I had several conversations with several Colombian boys who found themselves in the same position that I was, and we felt that it was better for us to serve in the Colombian Army fighting for a common cause rather than in the [fol. 40] United States Army where we might be treated as tropical boys. In other words, we felt that language, religion, and idiosyncrasy was to be found in a group of boys from the same country.

Q. Did you at any time deny that you had signed an affidavit refusing to serve in the United States Army?

A. Yes, I denied having signed Form 301 in the Consulate in Mexico City.

Q. If, in fact, you did sign Form 301, how did it happen that you denied signing it?

A. Because as I stated before when I signed Form 301 I understood it to be a choice between the Colombian Army and the United States Army, and never any form or document that might preclude me from becoming a citizen. In so far as I was later called into the United States armed forces and classified 1-A and inducted and went through all my physicals I never thought the fact that I had signed that form before was still in effect. In other words, if I had thought that that form was still in effect

I never would have signed a sworn statement at the American Consulate in Mexico.

(9) Q. Were you ever actually inducted into the United States Army?

A. No. I went through my physicals and then I was classified 4-F.

Q. And after you were classified 4-F did you go to Mexico?

A. Yes; I was transferred by my employer to take charge of the affairs of the company in Mexico.

Q. And at the time that you were transferred, as you put it, did you apply for a reentry permit?

A. Yes, I applied for a reentry permit in this building.

Q. Did you secure that reentry permit?

A. Yes, I was issued a reentry permit but that was mailed to me to Mexico.

Q. And in connection with that reentry permit did you ask your draft board for permission to depart from the United States?

A. I had to, otherwise, I would not have been able to leave the country.

Q. And did you secure this permission from your local draft board?

A. Yes.

[fol. 41] By Counsel:

I offer two photostatic copies, and the original for purposes of comparison.

By Hearing Officer:

Photostatic copy of D.S.S. Form 351, "Permit of Local Board For Registrant to Depart From The United States" is entered into evidence as Exhibit No. 9. Original compared and returned.

Counsel to Respondent:

Q. You testified that when you stated in Mexico City that you had never signed this form, that you did not know that it was still in effect, what do you mean by "still in effect"?

A. As I explained to you before, we—the Latin boys—that were being called to the draft board for examination felt that we were given a different treatment, a different * * * were being treated in a different phase than the natives of this country, and that every case was going to be treated separately. For that reason Form 301 was being issued to every one of us as a temporary deferment until we were told what army to go or to what army we should go. Therefore, when I was told by the United States Army in 1943 that I had to serve in (10) the United States Army, naturally Form 301 ceased to exist as far as I was concerned.

Q. Did you when you were called in 1943 object to being examined for induction into the army? Did you claim that you were not subject to service?

A. No. As a matter of fact I was waiting to be called. I was not making any plans at all. I was waiting to be called in the armed forces.

Q. And what was the only reason that you did not go into the armed forces?

A. I was later classified 4-F.

Q. So that the matter can be entirely clear on the record, did you at any time understand that you were signing a paper by which your citizenship would be effected?

A. No.

[fol. 42] Q. Was that explained to you at any time by anybody in the draft board?

A. Never.

By Counsel:

No further questions.

Hearing Officer to Respondent:

Q. You came to the United States for permanent residence on February 23, 1942; is that correct?

A. Yes, sir.

Q. What was your occupation in the United States for the next year or year and a half?

A. I was employed at Smith Kirkpatrick, New York City and Union Carbide & Carbon Corporation.

Q. In what capacity were you employed by these companies?

A. Export clerk in Smith Kirkpatrick—general export position—and in Union Carbide & Carbon I was a translator.

Q. Then you understand the English language?

A. Yes, I understand the English language.

Q. I show you a DSS Form 301, an "Application By Alien For Relief From Military Service" and ask you if this is your signature contained thereon?

A. Yes, it is my signature.

Q. I now show you a photostatic copy of a document which was (11) obtained from the Selective Service System, and ask you if this is your personal history and statement form filled out and signed by you as indicated?

A. Yes, sir.

Q. I particularly call your attention to question No. 41 and ask if that is your own handwriting in which the word "do" appears therein?

A. It is.

By Hearing Officer:

Photostatic copy of Form D.S.S. 304, "Alien's Personal History and Statement" executed by the respondent June 16, 1943, is entered into evidence as Exhibit No. 10.

[fol. 43] Hearing Officer to Respondent:

Q. You mentioned before about serving in the Colombian Army. Are you aware of the fact that Colombia did not enter the war against Germany until November 26, 1943?

A. I cannot discuss that point because I am not very sure, but I would believe that Colombia broke relations with the Axis at the time of Pearl Harbor.

Q. That is correct. However, Colombia was not at war with Germany or Japan until November 26, 1943, when a state of belligerency was declared, so that I fail to follow your statement that you wanted to join the Colombian Army perhaps in preference to the United States Army in the common cause when there was no common cause at the time you requested deferment.

A. The boys that were studying here at that time, that were going to college in this country at that time, and I discussed the situation according to what we understood it to be. If we went into the United States Army we felt that we would not have the same opportunity of being treated as fair as a native of the United States, and not only because we were aliens but also because being used to tropical climates that we might be sent to places that were extremely full of tropical or other diseases. Therefore, not being able to ask anybody in the draft board about what was the best procedure to follow due to the fact that at that time millions of boys were being drafted and the forms were being handed to you to be filled if you wanted to fill them, then I believe that it was our idea at that time that we were going to be given an opportunity to fight in a squadron that either existed or was going to be formed or originating from Latin America. I further understood that if were going to join such squadron, the same as the 201st from Mexico, that we had to go to our (12) country.

Hearing Officer to Counsel:

If you have no objection I should like to enter into evidence a photostatic copy of Form 301 in lieu of the original.

[fol. 44] By Counsel:

I have no objection.

By Hearing Officer:

Photostatic copy of Form 301, "Application By Alien For Relief From Military Service" will be entered into evidence as Exhibit No. 11.

Hearing Officer to Counsel:

I have no further questions of the respondent at this time. Is there anything additional that you would like to present?

By Counsel:

I would like to ask a few additional questions.

Counsel to Respondent:

Q. Mr. Ceballos, you stated in answer to question No. 41 on Form 304, Exhibit No. 10 in this case, as follows: "I do object to service in the land or naval forces of the United States. What did you think that that meant?

A. I meant that I was to serve in the Colombian Army. In this form it says that I understand it will deprive me from becoming an American citizen. Naturally when this form was signed, as I said before, I understand that it was something temporary, and in so far as I was going to serve in the army that this was obsolete.

By Counsel:

I have no further questions. I wish to present respondent's wife as a witness in his behalf.

Hearing Officer to Witness:

Q. What is your name?

A. Jacqueline Michot Ceballos.

[fol. 45] Q. Will you please stand and raise your right hand, and be (13) sworn. Do you solemnly swear that all the testimony you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Hearing Officer to Counsel:

You may proceed with the witness.

Counsel to Witness:

Q. Mrs. Ceballos, are you the wife of the respondent?

A. Yes, I am.

Q. Is this your marriage certificate?

A. Yes, it is.

(Shown original of Exhibit No. 7.)

Q. Are you a citizen of the United States?

A. Yes.

Q. How did you become such citizen?

A. I was born here of American citizens.
Q. Is this a certificate of your baptism?
A. Yes, it is.

By Counsel:

I offer photostatic copies in evidence together with the original for purposes of comparison.

By Hearing Officer:

Photostatic copy of document issued by the Church of St. Ann in Mamou, Louisiana, dated September 27, 1925, certifying to the baptism of Teresa Jacqueline, child of Louis Michot, born in Mamou, Louisiana, on September 8, 1925, and baptized on September 27, 1925, the said document not bearing the seal of the church, is entered into evidence as Exhibit No. 12. Original compared and returned.

Counsel to Witness:

Q. Mrs. Ceballos, where did you get that baptismal certificate?
A. Well, I got it from my parents.
[fol. 46] Q. How long ago did you get it from your parents?
A. Five or six years when I came here I took it with me.
Q. In other words, when you left Louisiana?
A. I took it with me.
(4) Q. Do you know whether they keep birth records in Mamou, Louisiana?
A. No, I don't think they do. I wrote for mine and they said they sent to New Orleans for it, and I secured a birth certificate on which I obtained an American passport.

By Counsel:

If it should be necessary to secure another copy of that birth certificate, same will be furnished.

Counsel to Witness:

Q. Mrs. Ceballos, why did you marry your husband?
A. Because I loved him.

Q. Have you lived continuously with the respondent since the date of your marriage?

A. Yes, I have.

Q. Has he supported you or have you worked and supported yourself since that time?

A. He supported me.

Q. In other words, you are wholly dependent on your husband for support?

A. Yes, I am.

Q. When you came to the United States in April 1951 how were you feeling?

A. Well, I was not feeling too good.

Q. And what did you do about not feeling too good?

A. Well, I went to see this doctor I had known and he examined me and told me that I should take very good care of myself, and advised me to find a good doctor, which I did, and he happened to know of the doctor and said that he was a very fine doctor, so I am under that other doctor's care right now.

Q. And what are you under that doctor's care for?

A. Because I am pregnant.

Q. Have you had any difficulty with that pregnancy?

A. Yes, I have.

[fol. 47] Q. As a result of that difficulty did you and your husband (15) change your plans in any way?

A. Yes, we did.

Q. In what way?

A. I decided that it was best to stay here after both doctors had advised me that it was best because of the conditions in Mexico and because I was here with my family and I would get the best medical care here and my child would get the best medical care, but whereas in Mexico I hear, and the doctors have told me, that the medicine is not as good, the food is very bad for children, and I have heard of many cases of pregnant women, especially women who have been having difficulties during the time of their pregnancy and had lost their babies or something happened to them—their health—because they did not have the medical care that we can get over here and also I understand that in delivering a baby they don't use the same methods so that it is sort of antique; how do you say—old

fashioned. They don't help the mother as much. She bears a child as though she was having it 200 years ago.

Q. And is that the reason why you wanted to stay in the United States?

A. And I would also like my child to be an American citizen and reared here and I would like him to go to American schools.

Q. And did you tell all this to your husband?

A. Yes.

Q. And as a result of that he stayed with you in this country?

A. Yes.

Q. When you left Europe where had you intended to come?

A. Well, we were going to go on to Mexico.

Q. Would you be effected economically if your husband was deported?

A. I guess so; yes.

Q. What do you mean by that? Could you be more specific?

A. Well, if he is over there and I am over here I guess there would be some difficulty in supporting two families. I could still not be too sure if a man and wife is separated for a long time. You never can tell what happens, and I have no way of being sure.

Q. You are sure now?

A. Yes.

[fol. 48] (16) By Counsel:

No further questions.

Hearing Officer to Witness:

Q. When do you expect your child?

A. October 15th.

Q. Did you know you were pregnant when you came to the United States in April 1951?

A. Yes, I did.

Q. How long have you known your husband?

A. Well—let me see. I would say almost two years.

Q. You travelled with your husband to the United States on one occasion from Mexico; is that not correct?

A. Yes, it is.

Q. And that was in June 1950?

A. Yes.

Q. Were you aware at that time that your husband was still married to someone else?

A. No, I was not.

Q. Were you under the impression that he was single or divorced?

A. No—divorced.

Q. Did he tell you that he was divorced?

A. Well—yes.

Q. There is now in evidence a decree of divorce indicating that the proceeding was not concluded in Mexico until June 30, 1950. Are you aware of that now?

A. Yes, but I knew that the divorce was in process.

Q. Did you ever live with your husband as man and wife prior to your marriage?

A. Yes, I did.

Q. Have you lived in Mexico for any length of time before?

A. Well, I visited there.

Q. What is the longest period of time you ever spent in Mexico?

A. I think it was a month and a half.

Q. If it was determined that your husband was not eligible for permanent residence in this country, what would you do?

(17) A. Well, I would stay here.

Q. You would give up your marriage then, in other words?

A. No, I don't think I would.

Q. You mean eventually you might join your husband after your child was born?

A. No. I would hope that he can come here.

[fol. 49] By Hearing Officer:

I have no further questions of the witness.

Hearing Officer to Counsel:

Do you have anything further?

By Counsel:

No.

Hearing Officer to Respondent:

Q. From the record before me, the only relief which you may possibly be eligible for is to ask to be permitted to leave the United States voluntarily instead of being deported from this country. So that I ask you now: Do you wish to make an application to be permitted to leave the United States voluntarily instead of being deported?

A. I would have to ask my counsel.

Hearing Officer to Respondent:

Yes.

By Respondent:

I would be willing to leave if I could come back for permanent residence.

Hearing Officer to Respondent:

Q. Am I to understand then from this answer that you are at this moment not prepared to leave voluntarily?

A. No.

By Counsel:

If the respondent is not accorded suspension of deportation he would like to secure voluntary departure and pre-examination, (18) or even voluntary departure without pre-examination provided that the Consul would grant him a permanent visa to return to this country.

[fol. 50] Hearing Officer to Respondent:

Q. What sources of income do you have at present?

A. I am a managing director of the Commodity Service Corporation and I earn $250 a week.

Q. Do you have any other source of income?

A. No, sir.

Q. What is the state of your assets in this country?

A. I have invested a substantial amount of money in the Commodity Service Corporation.

Q. Do you expect to receive any return on that money in addition to your salary from the company?

A. Yes. If any profits are made I make 52% of the profits.

Q. Do you have any property in Mexico?

A. Not now.

Q. What happened to the property you did have in Mexico?

A. I assigned it to my children from my previous marriage.

Q. When did you do that?

A. About May of 1950.

Q. You are the owner of a business called the American Traders?

A. Pan-American Traders.

Q. Are you still the owner of that business?

A. That is in liquidation, and the company has no assets now.

Q. On June 12, 1950, when you were examined by a Board of Special Inquiry in San Antonio, Texas, you said that business was worth 200,000 pesos and that you owned 50% of it. What happened since then?

A. My share in the business was transferred over to Commodity Service Corporation as part of my investment in Commodity Service.

Q. You also indicated that you were the owner of a cotton ranch in Matamoros.

A. That was assigned to my children.

Q. You also indicated that you were the owner of a cotton gin (19) in the same place.

A. That was assigned to my children.

Q. You also indicated that you had a house in Mexico City.

A. Yes. That was assigned to my children.

Q. When did you invest your money in the Commodity Service Corporation?

[fol. 51] A. I invested my money in Commodity Service on May 4, 1950 while I was still in Mexico.

Q. You knew at that time that you did not have permission to enter the United States for permanent residence?

A. Yes, but I intended all the time to operate from Mex-

ico because Mexico had been my center of operations for all these years, and, as a matter of fact, the idea of setting up Commodity Service Corporation here was to form a new company in Mexico under my supervision, and I was going to buy things down there—agricultural products in Mexico—and ship them here to the United States.

Q. What happened to your plans to remain in Mexico a representative of this company?

A. While in Mexico we bought a very substantial amount of olive oil in Spain, and because of the language facility—my knowledge of the Spanish language—I was sent as a representative of the firm—Commodity Service—to Spain.

Q. When you came here on April 2, 1951, was it your intention to remain permanently in the United States?

A. No, it was not my intention. I was going to Mexico to continue with this plan.

Q. Outside of the considerations of your wife, what else prevented you from going to Mexico, if anything?

A. I do not have any particular reason for not wanting to go to Mexico other than that considering the way my wife feels about remaining here in the United States and the fact that so many things are left behind in Mexico, I would very much like to remain here; my business is here, my wife is from this country, and my relatives—my other brothers—are moving to this country, and this is the place where I should be.

Q. When were you last in Colombia?

A. As a foreign representative for Commodity Service I had to go to Lima, Peru, to set up an office there, and I visited Colombia twice both on my way down and on my way up to Mexico.

Q. When was that?

(20) A. October 1950.

Q. You at one time indicated that you had invested as much as the sum of $190,000 in the Commodity Service Corporation; is that correct?

A. Yes, it is true.

[fol. 52] Q. When you went to Mexico in 1946 were you the possessor of any great wealth of any kind?

A. In 1946 I—Yes, I was in the hides business at that time.

Q. In what activity or business did you acquire most of your money?

A. Importing and exporting hides—importing hides from Colombia.

Hearing Officer to Counsel:

Do you have anything further?

By Counsel:

No.

Hearing Officer to Respondent:

Q. In the event that you are ordered deported from the United States, what country do you wish to specify as the country to which you shall be deported?

A. I am a citizen of Mexico.

Q. Am I to understand then that you prefer to be sent to Mexico?

A. Yes.

By Counsel:

This man is extremely eager to regularize his immigration status in the United States. He believes that whatever effect the signing of the Form 301 had should be eliminated in view of his lack of understanding of what he was doing. He wishes to test out this question but without prejudice to his right to ask for and accept voluntary departure at a later stage of the proceeding when the question of the Form 301 has been finally adjudicated.

Hearing Officer to Respondent:

Q. I will now state for the record and in your presence my decision in this matter. Do you understand?

A. Yes.

* * *

[fol. 53] (21) Hearing Officer to Respondent:

Q. Did you understand the decision I have just made?

A. Yes.

Hearing Officer to Counsel:

You have the right to take exception to my decision, in which event this will serve as an appeal to the Commissioner in Washington, D. C.

By Counsel:

I do, but I should like to be given a reasonable time after securing a copy of the record and so many of the exhibits as the Government has in its possession.

Hearing Officer to Counsel:

In view of the complexities of this case you are granted an extension of time, within which to file exceptions, to five days from the service upon you of the record of hearing herein.

By Hearing Officer:

Hearing closed.

I certify that the foregoing is a true and correct transcript of my shorthand notes of the testimony taken by me in the above case.

John Yonke, Stenographer.

I certify that to the best of my knowledge and belief this record is a true report of everything that was stated during the course of the hearing, including oaths administered and the rulings on objections, except statements made off the record.

Aaron I. Maltin, Hearing Officer.

AIM/jy
r. 7/31/51
t. 8/10/51

[fol. 54] UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE NEW YORK, N. Y.

[Title omitted]

TRANSCRIPT OF REOPENED HEARING OF MAY 25, 1953
BEFORE IMMIGRATION AND NATURALIZATION SERVICE

0300-112629

Special Inquiry Officer: Aaron I. Maltin
Stenographer: Marcelline Brady
Language: English
Hearing conducted at: Ellis Island, N. Y. H.

Date: May 25, 1953

COUNSEL:

Blanch Freedman, 220 Broadway, New York, N. Y. and James O. Berlinger, 220 Broadway, New York, N. Y.

[fol. 55] Reopened Hearing

Special Inquiry Officer to Respondent:

Q. Will you please stand and raise your right hand to be sworn. Do you solemnly swear that all the testimony you will give at this hearing today will be the truth, the whole truth and nothing but the truth, so help you God?
A. I do, sir.
Q. Where do you reside at present?
A. 3725 Henry Hudson Parkway.
Q. With whom do you live there?
A. With my wife and my child.
Q. What is the name of your child?
A. Douglas Christopher Ceballos.
Q. Where and when was he born?
A. October 29, 1951, in New York City.
Q. Are you the sole support of your wife and child?
A. Yes sir.
Q. Are you still a citizen of Mexico?
A. Yes sir.
Q. I presume you are aware that by an order of the

Board of Immigration Appeals dated January 6, 1953 your hearing has been ordered reopened (23) for the consideration of further evidence?

A. Yes sir.

By Attorney Freedman:

Mr. Hearing Officer, I think the order of the Board of Immigration Appeals indicates the purpose and the limited scope for which this hearing was called, namely, to determine the date a state of belligerency existed, and for a further field investigation of the case of Mr. Ceballos. Now, if this is a generally reopened hearing and that is your impression I would like the record to indicate my disagreement with such thinking.

By Special Inquiry Officer:

It is my belief that any hearing that is ordered reopened is reopened for all purposes for my consideration once the [fol. 56] hearing has been reopened. It is true of course that the Board of Immigration Appeals direction as to what shall be included in the record will of course be carried out. If anything new or vital to the decision in this case should be included I will include it in the record. There are no limitations on what may be entered into evidence except as to its relevancy.

Special Inquiry Officer to Respondent:

Q. I now show you report of investigation that was conducted recently and ask if you have anything to say about it?

A. I have nothing to say.

By Attorney Freedman:

I have no objection to this.

By Special Inquiry Officer:

Report of investigation dated April 17, 1953 is entered into evidence as Exhibit 12.

Special Inquiry Officer to Counsel:

I understand you exhibited to the Board of Immigration Appeals a document with reference to when Colombia became a co-belligerent in World War II.

By Attorney Freedman:

Mr. Inquiry Officer, we did more than exhibit. We submitted the original communications from the Colombian Embassy dated October 24; (24) 1951, with certified English translations thereof, advising that Colombia declared a state of belligerency against the Axis Powers by decree on November 26, 1942. If the record does not at this time contain the original letter I will be pleased to submit to you true photostatic copies of the same instruments.

[fol. 57] By Special Inquiry Officer:

Photostatic copy of letter on the stationery of the Colombian Embassy, Washington, D. C., dated October 24, 1951, addressed to Joseph A. Fanelli, signed by Minister Counselor, together with certified translation thereof, is entered into evidence as Exhibit 13.

Special Inquiry Officer to Respondent:

Q. I have before me a report of an investigation that was conducted by this Service, which I now show you.

By Attorney Freedman:

I object to the introduction into evidence of the handwritten statement by one Mr. Harris who, as far as I am concerned, is an unidentified officer of the Service, on the grounds that whatever statements he has set forth in his report is pure hearsay. It is in no way verified or substantiated. However, I will not object to the admission into evidence of the document that purports to be a certified copy of a decree made by the Government on December 22, 1941 with reference to the subject matter under discussion and which seems to emanate out of the office of the New York Consul and Central Office.

By Special Inquiry Officer:

Your objection is overruled.

By Attorney Freedman:

Exception.

By Special Inquiry Officer:

Report from Ralph P. Harris, Acting Assistant Chief, Investigation Section, New York, dated April 20, 1953, is entered into evidence as Exhibit 14.

[fol. 58] By Attorney Berlinger:

May I say something at this point? Will we have opportunity to (25) examine the lady named in that report of Mr. Harris, so that we can determine what the sources of her alleged information was, to go further and find out then whether or not that has any accuracy, because Mr. Harris' report appears to be hearsay upon hearsay, and nothing contained in it refers to anything other than what they were told. May we have the right to subpoena her, or will you produce her at the next hearing?

By Special Inquiry Officer:

I will not produce her at the next hearing. However, if you make request that a subpoena be issued for her appearance I will then consider whether that will be done.

By Attorney Freedman:

May we consider such request as having been made now?

By Special Inquiry Officer:

I will pass upon it at a later time when I have concluded with the hearing today, and when I have gathered certain further information, when it will be more easily ascertain- whether that testimony will be vital to the decision in the case.

By Attorney Berlinger:

I make one further motion. If the Hearing Officer is not now in a position to determine whether that testimony is

vital, that that paper be marked for identification and not in evidence until such time as its competence as well as its relevance can be established.

By Special Inquiry Officer:

The rules of hearsay are not binding in administrative hearings of this nature and I have accepted it and will allow it to remain in evidence.

[fol. 59] By Attorney Berlinger:

Exception.

By Special Inquiry Officer:

Decree dated December 22, 1941, certified as authentic copy by the Consul General of Colombia at New York, on March 17, 1953, together with a letter which forwarded that decree to the Colombian Consul from the Colombian Embassy in Washington dated March 5, 1953, together with certified translations of both documents, are all together (26) entered into evidence as Exhibit 15.

By Attorney Freedman:

May I see the last Exhibit 15 please, the full exhibit?

Special Inquiry Officer to Respondent:

Q. I now show you transmittal memorandum from the National Headquarters of the Selective Service System in Washington, D. C. dated June 3, 1943, and I particularly call your attention to the last page of the four pages, page number LBM 112-5, under which there are listed all neutral countries as of that date, and Colombia appears therein, and I ask if you have any comment to make about that document?

By Attorney Freedman:

If it is your intention to offer this into evidence, Mr. Inquiry Officer, I object to it. There is nothing to show at all that this slip of paper appears numerically and naturally with this communication. I also do not know the source of the communication. It is neither signed nor certified in

any way as being a true communication. There is nothing to indicate whether there has been anything that appeared on this immediately after, or whether this is a true copy [fol. 60] of a memorandum that went out. This is printed material issued some time—if at all—on June 3, 1943, and there is no proof or indication that it was ever communicated to him, or that it is a correct document as to the state of affairs.

By Attorney Berlinger:

This is objected to as incompetent. It is merely a memorandum exchange inter-office between two divisions of National Selective Service, and statements contained in it are not the best evidence, and therefore are not evidence of any materials contained therein. We would have no objection to any certified instrument or decree which will show what this purports to indicate, but this is not acceptable proof.

By Special Inquiry Officer:

I will attempt to obtain a certified copy of the decree of November 16, 1942, which is referred to in Exhibit 13 and if I can obtain that decree it may not be necessary to enter as evidence the document just offered, so that it will not at this time be placed in evidence. However, your objection to it is overruled.

In view of the evidence which is now before me, which creates some (27) confusion as to when Colombia actually entered World War II or became a co-belligerent, it will be necessary to defer this hearing to obtain the decree mentioned and any other evidence which might have a bearing on this issue. Do you wish to question respondent or offer any other evidence before I adjourn?

By Attorney Freedman:

If it is going to be adjourned I will do it on the adjourned date. There is no point in prolonging this hearing unnecessarily.

[fol. 61] By Special Inquiry Officer:

Hearing adjourned.

• • •

AIM:mb

I certify the foregoing pages 22 to 27 inclusive to be a true and correct transcript of my shorthand notes taken in the above case.

Marcelline Brady
Marcelline Brady, Stenographer

I certify that, to the best of my knowledge and belief, the record is a true report of everything that was stated during the course of the hearing, including oaths administered and the rulings on objections, except statements made off the record.

Aaron I. Maltin, Special Inquiry Officer

[fol. 62] UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
NEW YORK, NEW YORK

[Title omitted]

TRANSCRIPT OF HEARING OF JANUARY 25, 1954

File No.: 0300-112629
C. O. No.: A7 662 411
Special Inquiry Officer: Aaron I. Maltin
Stenographer: David J. Peacker
Interpreter: None
Language: English
Hearing Held At: Ellis Island, N. Y. Harbor
Date of Hearing: January 25, 1954

COUNSEL:

Blanch Freedman (present), 220 Broadway, New York City and James O. Berlinger (not present), 220 Broadway, New York City.

[fol. 63] Continued Hearing

Special Inquiry Officer to the Respondent:

Q. You are advised that you are still under the oath which you took at the time of your last appearance before me on May 25, 1953. Do you understand?

A. Yes, sir.

Special Inquiry Officer to Counsel and the Respondent:

Q. I now have before me a letter from the Colombian Embassy in Washington, dated September 2, 1953, to which is attached a number of documents in the Spanish language which have been translated, and I show these documents to you and ask if you have any comment you wish to make about it?

By Counsel:

A. I have no comment that I wish to make with respect to it at this time.

By Special Inquiry Officer:

Letter on the stationery of the Colombian Embassy, dated September 2, 1953 together with the documents in the Spanish language referred to in that letter and which are attached, and also together with translations of those Spanish documents are altogether entered into evidence as Exhibit #16.

(29) By Counsel:

With respect to your offering it into evidence, I'd like the record to indicate my objections to their admission into evidence on the ground that there is no opportunity being afforded us to examine the maker of the documents or the signer of the letter. There is nothing that I know of my own knowledge to warrant authenticating or accepting as authentic all of these instruments.

[fol. 64] By Special Inquiry Officer:

Your objection is noted, but it is definitely overruled.

By Counsel:

Except.

Special Inquiry Officer to Counsel:

Q. Do you wish to question the respondent?
A. Yes, I do.

Counsel to the Respondent:

Q. Mr. Ceballos, what is your marital status at the present time?
A. I'm married to an American girl.
Q. Are you still married to Theresa Jacqueline Michot?
A. Yes.
Q. The person you were married to when we had a hearing in this case a year or so ago?
A. Yes.
Q. And the certificate of that marriage was introduced into evidence and has been marked Exhibit 7, is that correct?
A. Yes.
Q. Have you had any children?
A. Yes, I have two children by that marriage.
Q. Give their names and their ages?
A. Douglas, age * * *
Q. (Interrupting) When was he born?
A. He was born on October the 29th, 1951, and Dennis, born August 14, 1953.

By Counsel:

Now, I ask that I be given permission to submit the birth certificate (30) for the son Douglas. I do not have it with me. I assumed since we have submitted it at the hearing before the Board of Immigration that it would be in the file, but I have since learned that it is not in their file. I [fol. 65] want an opportunity to submit the birth certificate of the child.

I now offer in evidence the birth certificate of respondent's son Dennis born on August 14, 1953.

By Special Inquiry Officer:

Do you wish to stipulate then in evidence a birth certificate for Douglas?

By Counsel:

That is correct.

By Special Inquiry Officer:

Birth certificate relating to Douglas Ceballos, when received, will be entered into evidence as Exhibit #17; and certificate of birth relating to Dennis Ceballos is now entered into evidence as Exhibit #18.

Counsel to the Respondent:

Q. I believe you testified that you first entered the United States—not first entered the United States in February, February 23, 1942 for permanent residence, is that correct?

A. Yes.

Q. At the time you entered the United States, that was at the port of New Orleans, is that correct?

A. Yes.

Q. How soon after you entered the United States did you register under the Selective Service Act for the draft?

A. Was May, early in May.

Q. Of what year?

A. Of 1942.

Q. Do you recall where you went?

A. Yes, I went to draft board number 40.

Q. And that was the board that was located at 349 East 58 Street?

A. Yes.

Q. What happened when you registered, were you given any forms to fill out, were you given any information?

A. They gave me a registration card.

[fol. 66] Q. Yes?

A. And registration card and form with the particulars.

(31) Q. Can you recall whether that would be called form 40, which was Selective Service questionnaire?

A. Yes, that was some questionnaire, yes.

Q. Now, how soon after did you fill that out after you registered, you recall, on May 4, 1942?

A. Yes, well, somewhere around that month.

Q. In the same month you filled that out and you filed that form, is that correct?

A. That's right.

Q. So that would be sometime in May of 1942. Did you discuss your status at that time with the local board, when you filed the questionnaire?

A. My status as to what?

Q. As to your serving the United States Army, was there any discussion had with the Board in May of 1942?

A. No, I don't think there was any discussion at the time.

Q. Was anything said or did you say anything?

A. Well, we did talk about serving in the United States Army, but nothing specific because I just went to register.

Q. Did you ever go to the Board after you filed the questionnaire in May of 1942?

A. Yes, I lost my card, my registration card and I went to get a copy.

Q. And did you get it?

A. Yes.

Q. Do you recall when that was?

A. That was about July.

Q. Did you ever have any occasion to go to the Board in addition to or other than the occasion that you went to advise them that you had lost your registration certificate and to request a duplicate?

A. Yes, I went there again to notify them of my change of address, I was living before in 58th Street, and then I moved to Forest Hills.

Q. Did you on any of these occasions that you appeared at the Board have occasion to discuss with the Board your status?

A. Well, I discussed it with the Board and many other Colombian fellows that were registered in the same Board.

[fol. 67] Q. What did you discuss with the Board?

A. The question of serving in the Army.

Q. Specifically, what was your problem or what was it that you discussed with the Board?

(32) A. Well, the question, as I recall, was that, that we were going to serve in a group, in a division of Colombians within the United States Army.

Q. When next did you hear from the Selective Service Board?

A. Well, they told me that they will notify me on this thing, and then it must have been May or June of the following year.

Q. That would be 1943?

A. 1943 when I heard from them.

Q. And when you say you heard from them, in what manner did you hear from them?

A. I got papers from the mail, long form with questions of all the places. As a matter of fact, two forms, if I remember right.

Q. Now, this form that you received from the Selective Service Board in the mail sometime in the end of May or the beginning of June, would that be the form that has been—a copy of the form that has been marked in evidence as Exhibit 10, known as form 304, which is designated as the alien's personal history and statement?

A. Yes.

Q. What did you do when you received that form in the mail, if anything, that, together with the other forms that you referred to?

A. I went to the draft board.

Q. Did you discuss the form with the draft board?

A. Yes.

Q. What was the nature of that discussion?

A. They have told me the year before that they were going to notify me with regard to this particular group of Colombians that was going to be made up, and then, of course, before I fill out anything else I went over there to discuss it.

Q. Now, in the form 304 under question or item number 41 apparently you filled in the word "do" so the sentence reads—I do object to service in the land and naval forces [fol. 68] in the United States. Do you have any recollection concerning that answer or that statement?

A. Yes, well, I—I do remember it because we have been discussing right along with the Colombian boys and the draft board the fact what would be the place where we would fight in serving with the U. S. Army, the question of this group or division was been discussed. Now, when I sign this form I put in it where "I do"—it was done on the understanding that there were going to set this—make up this particular group.

Q. Who was to determine whether you would serve in what you call the Colombian Division of the United States Army or in a general division of the United States Army —who would make that determination for you?

(33) A. As far as I was concerned the draft board, I don't know that it has.

Q. But you were not to determine—make that determination, you were only putting in the request that if they set up such a division you be included?

A. Yes.

Q. Did you ever go to the Board in person or did you ever make an application of the Board in writing, requesting that they give you a form designated DDS 301, which is entitled Application for Relief from Military Service by an Alien?

A. No, I never did.

Q. Did you ever want or desire relief from military service?

A. I never asked for it.

Q. Did you desire relief from military service?

A. No.

Q. Was it ever your intention to take or make or secure relief from military service?

A. No.

Q. After you filled out the questionnaire known as 304 and the other documents, did you submit them to the local board?

A. Yes.

Q. And that was done on June 16, 1943, is that correct?

A. Yes.

Q. When next did you hear from the Board or receive any mail from the Board?

A. Must have been about two months later, around August.

[fol. 69] Q. What did you hear or receive in August?

A. I received this form 301.

Q. Did that come to you in the mail?

A. Yes.

Q. I show you this form 301, marked Exhibit 11, and ask you whether this is a photostat of the document or papers you received in the mail from the Selective Service Board in or around August of 1943?

A. Yes.

Q. When you received this document in the mail, was it typed out and filled out the way it is now?

A. Yes.

Q. In other words, all the information that is contained on this document was already on the document when you received it, is that correct?

A. Correct.

(34) Q. Is that true for this registration number or did you——

A. (Interrupting) No, I—the only thing I inserted was my signature and the number of my registration card.

Q. Your alien registration?

A. That's my handwriting, yes.

Q. The rest was typed, but you did not type it?

A. No.

Q. You don't know who typed it?

A. No.

Q. It came to you typed?

A. Yes.

Q. Now, had you at any time requested or asked in any manner the Selective Service Board to give you or send you this form 301?

A. Never.

Q. What did you do after you received this form, which you say you received in the mail?

A. I went to the draft board.

Q. Did you have a discussion with them with reference to it?

A. We went over the thing again about serving in it,

this question about serving in the Army, this particular division of the United States Army.

Q. What do you mean by this "particular division of the United States Army"—you mean the Colombian division?

A. Yes.

Q. And what were you advised?

A. They just say sign this form here and we'll let you know.

[fol. 70] Q. Did you know or did you understand when you signed this document that you were asking to be relieved from military service?

A. No.

Q. Were you at that time or at any time prior thereto or at any time after, in fact seeking to be relieved from the military service or in the United States Army or in the army of any other country that might be fighting along with the United States?

A. No.

Q. Was it your desire and intention to serve in the United States Army at this time?

A. Yes.

Q. When you were advised that you would hear from them, did you subsequently (35) hear from the local board?

A. Oh, yes.

Q. When you next heard from them, were you told to appear for induction in the Army?

A. Yes.

Q. Around when was that?

A. About five months later, about January, I think.

Q. January of 1944?

A. Yes.

Q. And did you appear for induction?

A. Yes.

Q. And were you physically examined?

A. Oh, yes.

Q. And what occurred as a result of your physical examination?

A. I was excluded, I was not accepted, I was rejected.

Q. Why?

A. Because of a kidney ailment.

Q. Were you suffering from chronic nephritis?

A. Yes.

Q. And was that the basis of your classification 4F?

A. That's right.

Q. You were classified 4F, is that not right?

A. Correct.

Q. When you received a notification from the Selective Service Board to appear for induction, Mr. Ceballos, did you know at that time that you were being called to serve in a general division of the United States Army or in a Colombian division?

A. It was not received, it was the United States Army I was called to serve in.

Q. And did your receipt of this notice seem in accordance with the general understanding that you were given [fol. 71] by the Board as to what the procedure would be and how events would transpire?

A. That's right.

Q. After you were classified as 4F were you still under the jurisdiction of the Selective Service Board?

A. Oh, yes.

Q. Did you make application to the Board for permission to leave the United (36) States for a short period to go to Mexico?

A. Yes.

Q. And did they grant you such permission?

A. Yes.

Q. Did you at any time refuse to serve in the United States Army?

A. No.

Q. Were you at any time reluctant or non desirous of serving in the United States Army?

A. No.

Q. When you entered the United States in February of 1942, did you believe that your native country Colombia was a neutral country?

A. No.

Q. What had transpired prior to your leaving Colombia to give you the impression or the understanding that Colombia was not a neutral country?

A. On December 7, 1941, I was in Colombia when the Pearl Harbor, and that very day the manifestations and

the parades in the streets were nothing more but of war. The following day some sort of decree or something was passed whereby we were given to understand that we were at war with Japan. The following—towards the end of the following month I came to this country by boat and I arrived about 24 days later and everybody I talked to naturally was under the impression that we were all in a common war.

Q. So that irrespective of whether or not your country Colombia was actually engaged in physical war, it was your understanding that they were not a neutral country, is that correct?

A. That's right, yes.

Q. Would you be willing to serve in the United States Army, bear arms and fight in behalf of this country, if requested today?

A. Yes.

Q. You live with your wife and two children. Where, Mr. Ceballos?

A. In New Rochelle, New York.

[fol. 72] Q. Do you own your own home?

A. Yes.

Q. Where are you now employed, if at all?

A. By a corporation under the name of Ceballos Brothers, Inc.

Q. Are you financially interested in that corporation?

A. Yes, very much so.

Q. Are you an officer?

A. I'm president of the company.

(37) Q. And where is that business located?

A. 150 Broadway.

Q. So that you have in the United States a wife, two children and your business, is that correct?

A. Correct.

Q. Approximately how much do you draw each month from your business?

A. About $800.

Q. Does your wife work?

A. No.

Q. Are your wife and children completely dependent upon you for their support and maintenance?

A. Oh, yes, completely.

Q. Has your wife any independent income of her own or independent salary of her own?

A. None, whatsoever.

Q. If you had believed that the form 301 was an application to be relieved from serving in the military service, would you have signed such a form?

A. No.

By Counsel:

No further questions.

Special Inquiry Officer to the Respondent:

Q. What official, if any, at the draft board where you were registered told you about or spoke to you about any Colombian group being organized in the United States Army?

A. No, I wouldn't

Q. Did you hear from someone in the draft board or did you hear it outside of the draft board from other persons?

A. I heard it from the draft board.

Q. Did you ask them about it or did they tell you about it voluntarily?

[fol. 73] A. The group of Colombians and other Latin fellows were big enough to come with the information gratuitously, were willing to come with the information.

Q. When you filled out the form 304, that is the personal history and statement in June 1943 you put in the answer in your own handwriting, is that correct?

A. I would imagine so.

Q. Particularly the question where you wrote in the word "do" where it (38) states that you do object to serve in the Armed Forces of the United States, the word "do" is in your own handwriting?

A. Yes.

Q. Now, if you had in mind not to genuinely to object to serve in the army entirely, did you give any thought to adding any explanation of your own as to your willingness to serve in any Colombian group or as to a reason perhaps for your so answering that you do object?

A. It was not discussed—no.

Q. You stated under questioning by your counsel that you didn't understand that the form 301 was an application to be relieved from military service, yet the form at the top in bold letters, at least the largest on the page reads: Application by Alien For Relief From Military Service. What did you think that expression meant?

A. That it was relieved from a certain group, to serve in a group—but a branch of the United States Army. What was intended at the time was that we were, by being Colombians or Latins, we were not to be subjected to discrimination or certain things that we would by ordinarily, that we would ordinarily by serving in the United States Army. Now, this also was a branch of the United States Army, but with all of us Latins together.

Q. Did you read this form 301 before you signed it?

A. I would imagine I did, it was only, it was only used, as far as I am concerned as an instrument to set up the group.

Q. At that time when you signed it, did you pay any particular attention to the statement in the form that "I understand that the making of this application to be relieved from such liability will debar me from becoming a [fol. 74] citizen of the United States"?

A. That was not taken into consideration because the fact that I would serve in the United States Army would automatically eliminate that clause.

Q. However, when you signed this you had no idea that you would serve, ever serve in the United States Army?

A. Oh, yes, we were sure that we were going to serve.

Q. The war could have ended the next day, could it not?

A. It is true, but nonetheless we were being drafted at the time. The fact that the war might have ended would not have stopped us from going because we would be, would have *have* been drafted anyway.

Q. Then am I correct in saying that you, you knew what the form said, but in your own mind you had an interpretation that it didn't fully apply to you because you would serve in some special group in any event?

A. It wasn't in my own mind, it was what was going in the draft board at the time.

Q. Now, this form which you received in the mail, you say it was typed when you received it, that is the most spaces you filled in when you (39) received it?

A. Yes.

Q. However, it is signed and sworn to before a member—rather, an employee at the local board, is that correct?

A. Yes, it is.

Special Inquiry Officer to Counsel:

Q. Is there anything further?

A. Nothing further. Just one more question.

Counsel to the Respondent:

Q. Were it not for your physical condition, would you have served in the United States Army?

A. I would have.

Q. In other words, the only reason you didn't serve was because you were rejected by the Selective Service authorities?

A. Absolutely.

[fol. 75] By Counsel:

No further question:

Special Inquiry Officer to the Respondent:

Q. What is the extent of the business which you conduct as the president of the corporation you mentioned?

A. Is in an exporters, buyers and expediters.

Q. Do you do a large business?

A. Fairly large.

Q. What would you estimate to be the value of your interest in this firm?

A. About $61,000.

Q. And you are the head of this outfit?

A. Yes, sir.

Q. If you were found to be subject to deportation, what country would you choose?

A. Colombia.

Special Inquiry Officer to Counsel:

Q. Anything further?
A. No, sir.

(40) Special Inquiry Officer to the Respondent:

Q. I am now going to state for the record my decision in your case. Do you understand?
A. Yes.

Note: At this point in the proceeding, in the presence of the alien and his representative, the Special Inquiry Officer delivered an oral statement of his decision in the case. This has been transcribed separately and is attached hereto.

Special Inquiry Officer to the Respondent:

Q. Did you understand the decision I have just made?
A. Yes.

Special Inquiry Officer to Counsel:

Q. Do you wish to be served with a copy of my decision?

A. Yes, I want to be served with a copy of your de-
[fol. 76] cision and a copy of all testimony taken subsequent to the hearing held on July 31, 1951.

— After you are served with a copy of the decision and record you will be informed of your right to take exception thereto, which will serve as an appeal to the Board of Immigration Appeals. Do you understand?

By Respondent:

Yes.

I certify the foregoing to be a true and correct transcript of my shorthand notes of the testimony taken by me in the above case.

David J. Peacker, Stenographer.

I certify that to the best of my knowledge and belief, this record is a true report of everything (41) that was stated during the course of the hearing, including oaths,

administered and the rulings on objections, except statements made off the record.

Aaron I. Maltin, Special Inquiry Officer.

[fol. 77] U. S. Department of Justice
Immigration and Naturalization Service
New York, N. Y.

File: A-7662411 New York: 0300-112629

[Title omitted]

Oral Decision of Special Inquiry Officer—Rendered July 31, 1951

In Deportation Proceedings

In behalf of respondent: Carol King, Esq., 220 Broadway, New York, N. Y. James O. Berlinger, Esq., 220 Broadway, New York, N. Y.

Charges:

Warrant: Act of 1924—failed to maintain status—transit.

Lodged: None.

Application: Suspension of Deportation—Voluntary Departure and Preexamination

Detention Status: Alien released under bond of $1,000.

Oral Decision of the Hearing Officer

Discussion as to Deportability:

This record relates to a 37-year-old male, a native of Colombia and a citizen of Mexico, who last entered the United States at New York by plane on April 2, 1951, at which time he was admitted in transit to Mexico until April 23, 1951. That entry has been verified by the presentation of Form 257A of the Foreign Service. Since he was a bona fide

[fol. 78] transit at the time of arrival, his entry was a lawful one. There is a good deal of evidence in the record which casts doubt upon the respondent's statement that it was his intention to leave the United States at the time of his arrival on April 2, 1951, but he nevertheless insists that that was his intention at that time. On April 20, 1951, he signed a sworn statement before an officer of this Service stating that he had changed his mind and decided to remain in the United States permanently. He is therefore deportable under the Immigration Act of 1924.

Upon the basis of the foregoing I make the following findings of fact:

(1) That the respondent is an alien, a native of Colombia and a citizen of Mexico;

(2) That the respondent last entered the United States at New York on April 2, 1951, by plane in transit to Mexico, being admitted until April 23, 1951;

(3) That on April 20, 1951, the respondent signed a sworn statement before an officer of the Immigration Service stating that he had decided to remain in the United States permanently.

Upon the basis of the foregoing, I make the following conclusion of law:

(1) That under Sections 14 and 15 of the Immigration Act of May 26, 1924, the respondent is subject to deportation in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted, of a transit.

Discussion as to Discretionary Relief:

Respondent has made application for all three forms of discretionary relief. On the question of good moral character the respondent has presented a certificate from the [fol. 79] police of this City, the affidavits of two United States citizen witnesses who have known him for more than five years, and a statement from his present employer, all of which indicate that he has been a person of good moral character for the past five years. A report from the Federal Bureau of Investigation shows no criminal record in

this country, and the respondent has stated that he has never been arrested on any occasion in his life.

The respondent has been married on two occasions, and his first marriage ended in divorce in Mexico on June 30, 1950. His first wife and three children reside in Mexico. He is presently married to Jacqueline Michot who has appeared and testified as to her birth in the United States. They were married in New York City on January 3, 1951. In addition to her testimony the respondent's wife has presented an uncertified certificate of baptism which shows her birth in Louisiana on September 8, 1925. A certificate of birth was allegedly filed with the State Department for the issuance of a United States passport. Respondent's wife has stated that she is entirely dependent upon the respondent for support. She is at present expecting a child sometime in October 1951.

Respondent has made application for suspension of deportation and for preexamination, but in view of the fact that on August 26, 1943 the respondent signed DSS Form 301 requesting exemption from military service he is barred from acquiring United States citizenship and is thus likewise barred from discretionary relief in the nature of suspension of deportation or the issuance of a visa to him for permanent residence so that he is not eligible for preexamination.

The respondent declined at this time to accept voluntary departure although he indicated that upon the further adjudication of his claims to suspension of deportation or preexamination he would be willing to depart from the United States voluntarily. The respondent because of his business interests in this country is of course [fol. 80] extremely anxious to avoid an order of deportation, so that in any event he may in the future be able to re-visit this country, but as stated above is still desirous of prosecuting his claims before departing voluntarily.

The respondent and counsel have offered various defenses to the signing of the Form DSS 301, but it should be noted that the respondent was employed in the United States prior to August 1943 as a translator, and from his excellent command of the English language makes it quite

clear that he must have known the contents of the document he was signing. He has offered as a defense that it was his impression that this document did not bar him from citizenship, but of course the DSS Form 301 plainly so states. At the time of his signing he was a permanent resident of the United States and his request was honored because at that time Colombia was a neutral country. On November 26, 1943, Colombia became a co-belligerent in World War II, and shortly thereafter the respondent was called for service in the United States Army. He was after examination placed in Class 4-F. As further evidence of his understanding of the form which he signed, respondent personally filled out in his own handwriting DSS Form 304 in which at question No. 41 he stated: "I do object to service in the land or naval forces of the United States." The reasons given by the respondent for his so doing are of no legal efficacy. It is sufficient that the respondent understood the language of the form which is simple and states quite clearly that he would be thereafter debarred from United States citizenship.

It is alleged by the respondent and his wife that after he was admitted to the United States in transit on April 2, 1951, that she consulted a doctor because of the fact that she was pregnant, and it was mainly upon her insistence that he decided to remain in this country. The respondent's wife characterized the medical conditions [fol. 81] prevailing in Mexico as distinctly inferior to what she could obtain in the United States, but it must be noted that the respondent is apparently a person of some means and I doubt very much whether he would be unable to obtain satisfactory medical attention in Mexico City at this time. It would seem more likely that this element is only one in the respondent's desire to remain in the United States, his business interests being somewhat tied up in this country. Although there is insufficient evidence before me to decide that his presence in this country for business purposes at this time is absolutely necessary, his business in the past has taken him to all parts of the world.

In view of all of the foregoing, it does not appear

that the respondent is eligible for suspension of deportation or for preexamination, and, having declined at this time to depart voluntarily from the United States, it is my decision that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

Aaron I. Maltin, Hearing Officer.

I certify the foregoing to be a true and correct transcript of my shorthand notes of the decision taken by me in the above case.

John Yonke, Stenographer.

I certify the foregoing to be a true and correct transcript of oral decision made by me at the hearing in this case.

Aaron I. Maltin, Hearing Officer.

AIM/jy
r. 7/31/51

[fol. 82] UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
NEW YORK, NEW YORK

New York File: 0300-112629
Central Office File: A7 662 411

[Title omitted]

ORAL DECISION OF SPECIAL INQUIRY OFFICER, RENDERED JANUARY 25, 1954

IN DEPORTATION PROCEEDINGS

In behalf of the respondent: Blanch Freedman (present), 220 Broadway, New York City, and James O. Berlinger (not present), 220 Broadway, New York City.

CHARGES

Warrant: Act of 1924, failed to maintain status—transit.
Lodged: None.

APPLICATION: Suspension of Deportation—Voluntary Departure and preexamination.

DETENTION STATUS: Released under $1000 bond.

Warrant of Arrest served April 23, 1951.

ORAL DECISION OF THE SPECIAL INQUIRY OFFICER ENTERED ON JANUARY 25, 1954.

[fol. 83] DISCUSSION: This record relates to a 40 year old married male alien, a native of Colombia and a citizen of Mexico. He last entered the United States at New York by plane on April 2, 1951, at which time he was admitted in transit to Mexico until April 23, 1951. That entry has been verified by the presentation of the form 257A of the Foreign Service. There is some evidence in the record which casts doubt upon the respondent's statement that it was his intention to leave the United States at the time of his arrival on April 2, 1951, but he nevertheless has testified and insists that it was

his intention at that time to so depart. On April 20, 1951 he signed a sworn statement before an officer of this Service stating that he had then changed his mind and decided to remain here. It is found that he was a bona fide transit at the time of his arrival and that his entry was a lawful one. Having remained beyond the period for which he was admitted, however, he is now amenable to deportation under the Immigration Act of 1924.

The respondent has made application for Suspension of Deportation and for Voluntary Departure and Preexamination. He has previously presented adequate evidence of good moral character, and it is found that he has satisfactorily established that he has been a person of good moral character for the past five years and is statutorily eligible for the privilege of Voluntary Departure.

The respondent has been married on two occasions. His first marriage ended in divorce in Mexico on June 30, 1950. His first wife and three children reside there. He is presently married to a native born citizen of the United States, and he has two children born in this country with his second wife. They were married to each other in New York City on January 3, 1951. She and the two children are completely dependent upon him for support, and it is adequately established that his deportation would cause serious economic detriment to them. [fol. 84] The bar to his being granted Suspension of Deportation or Preexamination so that he could obtain a visa is the fact that he, on August 26, 1943, signed DSS form 301 "Application by Alien for Relief from Military Service." This request makes him ineligible to United States citizenship, and he is, therefore, ineligible for the discretionary relief of Suspension of Deportation or Preexamination, as he will not be able to obtain a visa.

The respondent is engaged in the importing and exporting business, from which he draws approximately $10,000 a year. His interest in this firm exceeds $60,000. He is the president of the concern and from his general demeanor and business standing I would assume

that he is a person of intelligence and ability to understand the nature of documents, even though of a somewhat complex nature. There is no claim by him that he was not aware of the contents of the documents he signed, either the DDS form 301 or form 304. However, he has offered as a defense that he had a different impression as to the ultimate effect of these documents. He did not believe that they barred him from citizenship, as it was his intention to serve in a group, which he understood was to be formed consisting of Latin Americans residing in the United States. There is no evidence before me to support the respondent's statements that the draft board informed him that such a group was being formed. However, even if this was so, he made no attempt either on the form 304 or on the form 301 to qualify his answers and to indicate what were his mental reservations, if they existed. At the time of his signing these forms, he was a permanent resident of the United States and his request was honored because at that time Colombia was a neutral country. The respondent has offered some evidence to question the fact of whether or not Colombia was a neutral country at the time of the execution of the form 301. It is clear from what is now [fol. 85] Exhibit 16 that it was not until November 26, 1943 that Colombia became a co-belligerent in World War II. Shortly after this, in about January 1944, the respondent was called for service in the United States Army, at which time he states he was willing to serve, but he was placed in class 4F and was rejected for military service. Since under the Selective Training and Service Act of 1940 Colombia was regarded as a neutral country until November 26, 1943, even though the respondent questions this fact, as long as he has received exemption from military service as a result of the Selective Service's interpretation that Colombia was a neutral, he is now in effect estopped from denying the neutrality of Colombia at the time of his application on form DSS 301. See in the Matter of D————————, A-3203582, decided by the Board June 23, 1953 (Interim Decision No. 463). It has been held that persons who have actually served in the military service of the United

States after signing a form 301 may thereby, under certain circumstances, not be barred from United States citizenship. However, it has also been held that where persons, through no fault of their own, have been classified 4F and did not serve in the United States Army, they are nevertheless bound fully by the form DSS 301 and are still barred from citizenship.

Although there is no specific request before me for the relief of Voluntary Departure alone, without the additional privilege of Preexamination, this appears to be based upon the many ties that the respondent has in the United States and his extensive business interest here which makes him extremely reluctant to depart unless he is found to be ineligible for any relief. Despite the absence of a specific request for Voluntary Departure, in view of the fact that he is pursuing a course which he believes to be legally tenable and apparently believes that he should be granted relief, this privilege will be granted to him.

In the event of deportation he has chosen Colombia.

Upon the basis of the foregoing, I make the following [fol. 86] Findings of Fact:

(1) That the respondent is an alien, a native of Colombia and a citizen of Mexico;

(2) That the respondent last entered the United States at New York on April 2, 1951 by plane in transit to Mexico, being admitted until April 23, 1951;

(3) That the respondent on April 20, 1951 signed a sworn statement before an officer of the Immigration Service stating that he had decided at that time to remain in the United States permanently;

(4) That there is no indication that respondent ever obtained an extension of his temporary stay beyond April 1951.

Upon the basis of the foregoing Findings of Fact, I make the following Conclusion of Law:

(1) That under Sections 14 and 15 of the Immigration Act of May 26, 1924, the respondent is sub-

ject to deportation, in that, he has remained in the United States after failing to maintain the exempt status under which he was admitted of a transit.

Order: It is ordered that the alien be granted Voluntary Departure at his own expense, in lieu of deportation within such period of time or authorized extensions thereof and under such conditions as the District Director or Officer in Charge, having administrative jurisdiction of the office in which the case is pending, shall direct.

It is further ordered that if the alien fails to depart when and as required, the privilege of Voluntary Departure shall be withdrawn without further notice or proceedings and the alien deported from the United States in the manner provided by law on the charge contained in the warrant of arrest.

Aaron I. Maltin, Special Inquiry Officer.

[fol. 87] U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

October 19, 1954

File: 0300-112629—New York (A-7662441)

[Title omitted]

DECISION OF BOARD OF IMMIGRATION APPEALS, DATED OCTOBER 19, 1954

IN DEPORTATION PROCEEDINGS

In behalf of respondent: Joseph Freehill, Esquire, 1701 K Street, N. W., Washington 6, D. C.

(Heard: May 20, 1954)

(Joseph Fanelli, Esquire, also present)

CHARGES

Warrant: Act of 1924, failed to maintain status—transit.

Lodged: None.

APPLICATION: Suspension of deportation or voluntary departure and preexamination

DETENTION STATUS: Released under bond

Appeal from the order of the special inquiry officer finding respondent deportable on the ground stated above, denying his application for suspension of deportation on the ground that he was statutorily ineligible for such relief, and granting voluntary departure.

Respondent is a 40-year-old married male alien. He last entered the United States in 1951 when he was admitted in transit to Mexico. He remained beyond the [fol. 88] period for which he was admitted and is clearly deportable on the charge contained in the warrant of arrest. He was born in Colombia and was a Colombian national until sometime after August 26, 1943 when he filed DSS Form 301. In a manner and at a time

not specifically disclosed by the record, he became a citizen of Mexico. (At oral argument counsel stated his belief that acquisition of Mexican nationality occurred in 1950.)

The issue presented to us concerns his eligibility for suspension of deportation. Application for such relief was timely submitted under the provisions of the Immigration Act of 1917, as amended. The special inquiry officer concluded that respondent's deportation would result in a serious economic detriment to his native-born citizen wife and two native-born citizen children, but that the respondent could not be given suspension of deportation because he was ineligible to naturalization and one so ineligible is expressly barred from the grant of suspension of deportation (Section 19(c), Act of February 5, 1917, as amended). The special inquiry officer found that the respondent was ineligible to naturalization because on August 26, 1943, at a time when he was a permanent resident of the United States, respondent signed Form DSS 301 (Application by an Alien for Relief from Military Service). Under the provisions of Section 3(a) of the Selective Service Act of 1940, a person who filed such a form was relieved from service but was permanently barred from becoming a citizen of the United States. On this issue, we reach the same conclusion as did the special inquiry officer.

In brief, respondent's contentions are that in executing Form DSS 301, he never intended to ask for relief from service in the armed forces; that his act was the result of inaccurate representation by the Selective Service Board as to its effect; that he was not a citizen of a neutral nation at the time of filing; and that his action was ineffective because he did not receive any benefits by reason of it.

[fol. 89] The facts follow. Respondent was lawfully admitted to the United States for permanent residence in February 1942. In May he registered under the Selective Training and Service Act as required. On June 16, 1943, he executed Form DSS 304 which is entitled "Alien's Personal History and Statement". In his own handwriting he completed the question under Item 41

of this form to read as follows: "I do object to service in the land and naval forces in the United States."

Within two months thereafter, he received Form DSS 301 which he executed under oath on August 26, 1943 before a Selective Service official. The form is entitled "Application by an Alien for Relief from Military Service". As it applies to the respondent, a non-declarant alien, only two paragraphs in the form are relevant. The first paragraph is descriptive. The second paragraph follows:

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. I have not filed a declaration of intention to become a citizen of the United States.

On November 26, 1943 Colombia became a co-belligerent. In January 1944, respondent was called for induction. He was rejected because of a physical condition.

Other than respondent's bare statement that he completed Form DSS 301 solely in reliance upon representations made by an unnamed member or employee of the Selective Service Board as to the purpose and function [fol. 90] of Form DSS 301, and Form DSS 304, there is nothing in the record to support his claim. The testimony of an individual may be substantial proof even though it is self-serving; however, we conclude that the respondent's testimony in regard to the circumstances surrounding the signing of the Forms DSS 301 and DSS 304 is not substantial evidence in support of his claim.

Respondent states that prior to the completion of Forms DSS 301 and DSS 304, he had heard the formation of a United States army group composed of Latin Americans was under consideration; he approached the draft board for information as to the manner in which

he could be assigned for service to this group; and that he was officially informed by the draft board to complete Form DSS 304 to show he did not desire to serve in the armed forces of the United States if he desired consideration for assignment to the unit in question. His testimony is that in a sincere desire to serve, and relying upon the instructions of the Selective Service employee, he completed Form DSS 304 to show that he did not desire to serve in the armed forces. His statement is that to him this action meant only that he did not desire to serve in regular units of the armed forces, if he could be assigned to a Latin American unit in the United States Army.

It is further claimed that within two months thereafter, without his solicitation, there came to him Form DSS 301 partially completed. He took this form to the Selective Service Board and informed them of his desire to serve in a Latin American unit of the United States Army. He was informed that to obtain assignment to such a unit, he must complete Form DSS 301. Relying upon this assurance by the draft officials, he executed the form, not with a desire to escape service, but to serve in a special unit if that were the will of the draft board.

[fol. 91] Respondent does not deny that he knew the contents of the forms he signed, but states that he interpreted the matter therein in light of what he had been told by the draft board, to mean that he desired consideration for assignment to a Latin American unit in the United States Army.

We find great difficulty in accepting respondent's claim that in completing Form DSS 301, he was without any idea that he would be barred from citizenship and that his failure to realize the significance of his act was due to assurances he received from the draft board.

We have been informed of no regulation or instruction or practice which authorized a Selective Service employee to inform a registrant that a negative answer to question 41 on Form DSS 304 was to be used as a means for determining eligibility for service in a particular branch of the United States Armed Forces. In

fact, the regulations then in existence instructed Selective Service employees to refer registrants who asked for advice or assistance to an advisory board (32 CFR 621.6, Cumulative Supplement). We know of no regulation which authorized the board to accept Form DSS 301 from any registrant other than an alien who met the following two conditions: (1) that he was a neutral alien; and (2) that he did not desire to serve in the land or naval forces of the United States (32 CFR 622.43(2), 1943 Supp.). To now hold after a lapse of 11 years and in the absenuce of testimony from the clerk or any member of the board that Forms DSS 301 and DSS 304 were executed by the respondent because of instructions by the draft board in violation of regulations "would constitute an arbitrary ruling upon the methods pursued by the board in discharging its difficult functions, which is a position which could be justified only under very unusual circumstances" (*Petition of Miranda*, 111 F. Supp. 481, N. Y.). Certainly "very unusual circumstances" do not exist herein. Respondent's familiarity [fol. 92] with the English language cannot be questioned. Prior to the date he completed the forms in question, he was employed in the United States as a translator. He has capably conducted himself in the business world. He has been the managing director of an export firm and is now the head of such a firm. In 1950, he had an investment of $190,000 in a business. His present investment in his business is in excess of $60,000. A person presently associated with him in business considers him a very capable and active individual and a definite asset to the company in a senior executive capacity.

In view of respondent's knowledge of the English language, and the progress he has made in the business world, and in view of the simplicity and clarity of the statements in the forms in question; in view of the fact that he claims to have had at least three separate discussions with the draft board over a period of 13 months about service in the armed forces; and in view of the fact that the documents he signed were in his possession for some days for private perusal, it would be naïve to conclude that he had signed the documents objecting

to service in the armed forces and asking for relief "from liability for training and service in the land or naval forces of the United States" in a sincere desire to serve in the Armed Forces of the United States—the reason he now advances.

Furthermore, we find several inconsistencies in respondent's testimony from which we conclude that his recollection of events cannot be relied upon. He now contends that his action in signing the Form DSS 301 was based upon information furnished him by the draft board that he would thereby obtain a determination upon his desire to serve in a Latin American unit which was being formed in *the Armed Forces of the United States.* This differs from his recollection at his hearing on July 31, 1951 at which time while represented by two attorneys he testified as follows in response to a question [fol. 93] from his counsel as to his recollection of the circumstances under which he signed Form DSS 301:

> I went to my draft board and was presented with Form 301 for signature. At that time it was my understanding that it was a temporary deferment pending indication from the same draft board as to what would be the best choice for me as to whether I wanted to serve in the Colombian Army *or* the United States Army. I had several conversations with several Colombian boys who found themselves in the same position that I was, we felt that it was better for us *to serve in the Colombian Army* fighting for a common cause *rather than in the United States Army* where we might be treated as tropical boys. In other words, we felt that language, religion and idiosyncracy was to be found in a group of boys from the same country. (p. 8; emphasis added).

On the same page appears respondent's further answer:

> Because as I stated before when I signed Form 301 I understood it to be a choice between the Colombian Army and the United States Army (See also p. 12).

An affidavit executed by respondent on April 20, 1951 in the presence of his attorney contain- the following statement:

> Shortly after my arrival in the United States I signed a Form 301 because I preferred to return to Colombia and enter the army rather than to go into the United States Army at that time. However, by signing this form I thought it gave me the right to go into the Colombian Army rather than the new U.S. Army. * * * (Ex. 2)

[fol. 94] Another example of a discrepancy. Respondent now claims that he filed Form DSS 301 on the advice and at the instruction of the *draft board*. His recollection at the 1951 hearing was different. The following question and answer appear:

> Q. [By Hearing Officer] * * * However, Colombia was not at war with Germany or Japan until November 26, 1943, when a state of belligerency was declared, so that I fail to follow your statement that you wanted to join the Colombian Army perhaps in preference to the United States Army in the common cause when there was no common cause at the time you requested deferment.
>
> A. [By respondent] The boys that were studying here at that time, that were going to college in this country at that time, and I discussed the situation according to what we understood it to be. If we went into the United States Army we felt that we would not have the same opportunity of being treated as fair as a native of the United States, and not only because we were aliens but also because being used to tropical climates that we might be sent to places that were extremely full of tropical or other diseases. Therefore, *not being able to ask anybody in the draft board about what was the best procedure* to follow due to the fact that at time millions of boys were being drafted and the forms were being handed to you to be filled *if you wanted to fill them*, then I believe that it was our idea at that time that

we were going to be given an opportunity to fight in a squadron that either existed or was going to be formed or originating from Latin America. I further understood that if we were going to join such squadron, the same as the 201st from Mexico, that we had to go to our country. (p. 11, emphasis added.)

[fol. 95] Further, on the weight to be given to respondent's present self-serving declarations, we note that he has signed an affidavit before the American Consul in Mexico City *denying that he had signed Form DSS 301* (p. 8). His explanation was that he thought the effect of the signing of the Form 301 was a temporary one and that it had been dissipated by subsequent events. At the least, this explanation reveals such a selective attitude by the respondent toward facts that his candidness must be questioned. The discrepancies in the testimony and the subjective approach to factual matters do not establish that the respondent is such a candid individual or that he has the reliable recollection that substantial weight should be given to is self-serving explanations of the circumstances surrounding the execution of Form DSS 301.

Counsel finds significance in the fact that respondent did not ask the draft board to send him the Form DSS 301. The inference is apparently drawn from this that respondent's testimony to the effect that the draft board wanted him to sign the form to get a ruling on his desire to join the Latin American contingent in the United States Armed Forces is corroborated. We find no significance from the fact. There is no showing that the draft board sent the form to the respondent for the purpose claimed by counsel. There is nothing on this simple one page form which can be pointed to as indicating that the person executing it was making application for service in the land or naval forces of the United States in *any* capacity. Furthermore, whether solicited or not, respondent was under no obligation to complete the form if he did not desire to do so. His 1951 testimony reveals that he knew it was completely up to the

individual to submit the form or not. Moreover, the likelihood is that the form was sent to respondent as a direct result of his statement two months previously that he did not wish to serve in the Armed Forces of the United States to help him effectuate his wish. [fol. 96] It is urged that respondent did not consider himself a neutral alien at the time he signed and therefore did not believe that the bar to citizenship applied to him. We are more inclined to the view that respondent signed the form because he was a neutral alien and so considered himself. This is the obvious conclusion from the facts.

We conclude that respondent fully understood the legal consequences of his action and that he was not duly influenced by other considerations. We find the respondent knowingly and intelligently waived his right to apply for citizenship. The cases cited by counsel concerning situations where the Form DSS 301 was signed under circumstances preventing an intelligent waiver therefore have no application to the present situation.

Respondent argues that the forfeiture of the right to future citizenship by reason of signing Form DSS 301 was conditioned upon the obtaining of relief from liability from military service and training. It is alleged that he was never exempted from training and service as shown by the fact that he was called for induction in January 1944. We note in passing, but without being influenced by the fact, that this contention seems inconsistent with the previous position that respondent never applied for exemption from service. We do not find the argument persuasive. First, there is no competent evidence to establish that respondent was not reclassified in accordance with Selective Service regulations applicable to his case. Colombia did not become a co-belligerent until November 26, 1943. From the time respondent signed his claim for exemption in August 1943, and during all the time Colombia was a neutral, he was not called upon to serve. Only after Colombia became a belligerent was he called upon for induction. The fact that he was called for induction so quickly after Colombia became a belligerent and was not troubled from August

26, 1943, the date he signed the Form DSS 301, for the [fol. 97] entire period that Colombia remained a neutral is some evidence that he received the exemption he applied for. In any event, it is our belief that *the act of filing* the Form DSS 301 by the respondent who at the time was a neutral alien legally subject to military service, created the bar to naturalization. The clear language of the statute requires this conclusion. It states that certain persons may make application to be relieved, but any person "who *makes* such application *shall thereafter* be debarred" from citizenship (emphasis added, 50 USCA App. 303(a), 1944 Ed.). The statute does not require that any act follow the filing of the application to make the neutral alien exempt and the regulations to implement the law do not so provide (32 CFR 622.43, 1943 Supp.).

While this precise issue was not involved in the cases which follow, the language used by the courts appear to support our position. In *Machado* v. *McGrath*, 193 F. 2d 706, C.A. D.C., certiorari denied 342 U.S. 948, the court stated that "any person who *asks* for this relief (from service) is thereafter, debarred from becoming a citizen of the United States." In *Navarro* v. *Landon*, 108 F. Supp. 922, S.D. Calif., the court stated concerning an alien who had filed Form DSS 301 that *"his application* created the bar against naturalization." In *McGrath* v. *Kristensen*, 340 U.S. 162, 95 L. ed., 173, the court stated concerning the filing of a Form DSS 301 by a person who is not under a legal obligation to serve that "By the terms of the statute, that bar only comes into existence when an alien resident liable for service *asks* to be relieved." (Emphasis added in all cases; See also *Benzian* v. *Godwin*, 168 F. 2d 952, C.A. 2, certiorari denied 335 U.S. 886; *Petition of Dweck*, 106 F. Supp. 169, E.D. N. Y.; and *In re Molo*, 107 F. Supp, 137, 139, S.D. N.Y.).

In re Siem, 284 Fed. 868 (1922), affirmed 299 Fed. 582 (C.A. 9); and *In re Gustarson*, 300 Fed. 251, S.D. Calif. [fol. 98] (1924), cited by counsel, do not appear to be pertinent. Both were naturalization cases in which the issue was whether the fact that the aliens had filed claims

for exemption from service evidenced a lack of attachment to the principles of the constitution. The bar to naturalization upon the surrender of a declaration of intention appears to have been first added to the law by the Act of July 9, 1918. In *Siem* it appears that application for exemption was made prior to the Act of July 9, 1918. In any event, the case did not involve the statutory imposition of the penalty of eligibility, but only whether the exemption application based on alienage manifested lack of attachment to the principles of the constitution. In the *Gustavson* case the facts are not clear; there is no clear showing that exemption was claimed under the Act of July 9, 1918.

Counsel contends that Colombia was not a neutral nation at the time respondent executed Form DSS 301. The record clearly establishes that while the sympathies of Colombia were with the Allies from the time of Pearl Harbor, Colombia did not declare war until November 26, 1943, and until the date of the declaration of war, she was officially regarded by the Department of State and the Selective Service Board as a neutral nation. The contention must be dismissed.

Respondent is ineligible for suspension of deportation. Since respondent will be unable to obtain a visa because he is ineligible to enter the United States, the relief of preexamination cannot be given him. He has been granted voluntary departure by the special inquiry officer. This appears to be the maximum relief to which respondent is entitled. The appeal will be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Chairman.

[fol. 99] U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

[Title omitted]

DECISION OF BOARD OF IMMIGRATION APPEALS ON MOTION FOR RECONSIDERATION—FEBRUARY 17, 1955

File: A-7662411—New York (0300/112629)

IN DEPORTATION PROCEEDINGS

In behalf of respondent: Joseph Freehill, Esquire, 1701 K Street, N. W., Washington 6, D. C.

DEPORTABLE: Act of 1924—Failed to maintain status—Transit

MOTION FOR RECONSIDERATION

On October 19, 1954, this Board entered an order dismissing the respondent's appeal from the order of the special inquiry officer finding him deportable on the ground stated above. We, as did the special inquiry officer, denied the alien's application for preexamination and suspension of deportation. The application for suspension of deportation was considered under the Act of 1917. We decided that the respondent was legally barred from re-[fol. 100] ceiving suspension of deportation because he was not eligible for naturalization. We stated ineligibility for naturalization resulted because he had requested relief from military service as a neutral alien.

We found that the alien was a person of weak credibility for reasons fully set forth. One of these reasons was the fact that we found a conflict between the alien's present self-serving testimony and his past admissions. Counsel contends that the testimony given by respondent was not conflicting, but is consistent. We have carefully examined this contention and find no reason to change or add to our previous statement.

Other arguments are based upon the claim that the record does not clearly establish when Colombia ceased to be a neutral nation. We found that date to be Novem-

ber 26, 1943, the date the Selective Service Board also considered itself bound by. Counsel argues that Colombia ceased to be a neutral shortly after Pearl Harbor. He relies upon a letter dated March 5, 1953 from the Colombian Embassy at Washington, D. C. to the effect that a state of war between Colombia and the Axis was decreed on December 22, 1951. The decree of December 22, 1941 is attached to this statement. It reveals not a declaration of war, but merely that the Government of Colombia stated it would consider the United States as non-belligerent so that laws relating to the treatments of nationals of the United States and its vessels of trade and war would be applied to the United States as though the United States were in fact a neutral nation (Ex. 15).

Counsel also relies upon a letter dated October 24, 1951 from the Colombian Embassy at Washington, D. C. This letter states that by decree of November 16, 1942, the Government of Colombia declared a state of belligerency with the Axis powers (Ex. 13). A copy of that decree was not made a part of the record.

[fol. 101] While the two letters referred to raise a question as to the date Colombia became at war with the Axis powers and was so recognized by the Government of the United States, we believe the matter is settled by the last communication from the Colombian Embassy. Under date of September 2, 1953, the Embassy revealed that the state of belligerency occurred on November 26, 1943. A copy of the official decree relating to that occurrence is attached (Ex. 16). The fact that some considerable time after November 16, 1942, the latest date relied upon by counsel, the Colombian executive and legislature acted to declare war is the strongest evidence that the previous statements relied upon by counsel did not result in abandonment of the status as a neutral. Moreover, November 26, 1943 is also the date used by the Selective Service Board which was then charged with the responsibility of permitting only aliens of "a country which is neither a co-belligerent country nor an enemy country" to make application for exemption from service as a neutral alien (32 CFR 601.21(c); 622.43(b) (Cum. Supp. 1944)). We be-

lieve the record establishes that Colombia became a co-belligerent on November 26, 1943.

It appears to be counsel's argument that even if it be assumed that Colombia became a co-belligerent only after the alien had signed his request for exemption, he is still not barred from naturalization because the record establishes that he made such application acting in the belief that he was not a neutral, but a co-belligerent seeking a ruling as to whether he could be assigned to a Latin-American group in the regular American Army instead of a normal group. As we stated in our previous order, it is reasonable to assume from the evidence of record that Colombia's sympathies were with the Allies from the time of Pearl Harbor. Nevertheless, we concluded, after a very careful consideration of the entire record, that the respondent knew he was a national of a neutral [fol. 102] nation and that he signed the request for exemption with knowledge of its consequences. After again carefully considering counsel's contention, we see no reason to change our conclusion.

The argument that the respondent obtained no benefits from the filing of the DSS Form 301 and therefore his election never became effective, has been previously fully considered. We might further add that whether or not the alien was reclassified, it is clear that after he had filed his application, he could not have been legally inducted while Colombia remained a neutral (32 CFR 622.43(b), supra). The motion for reconsideration will be denied.

Order: It is ordered that the motion for reconsideration be and the same is hereby denied.

Chairman.

[fol. 103] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 130—October Term, 1955.

Docket No. 23721

LUIS ALVARO CEBALLOS (Y ARBOLEDA), Plaintiff-Appellant,

v.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York, Defendant-Appellee.

OPINION—FEB. 6, 1956

Before: MEDINA, HINCKS and WATERMAN, *Circuit Judges.*

Appeal from a decision and order of the District Court of the United States for the Southern District of New York. Irving R. Kaufman, *Judge.*

Plaintiff appeals from the District Court's dismissal of his complaint for failure to join an indispensable party. Opinion reported in 130 F. Supp. 30. Affirmed.

[fol. 104] Blanch Freedman and Gloria Agrin, New York City, for plaintiff-appellant.

Paul W. Williams, New York City (Harold J. Raby and Maurice N. Nessen, New York City, of counsel), for defendant-appellee.

MEDINA, *Circuit Judge:*

Plaintiff, an alien, seeks *inter alia* a declaratory judgment that he is not ineligible for naturalization under 8 U. S. C. A. § 155(c) (1950 Cum. Pocket Part) and, in effect, a stay of deportation until the Attorney General exercises his discretion with respect to plaintiff's application for suspension of deportation. The complaint, brought against the District Director of Immigration, was dismissed below on the procedural ground that the Attorney General or the Commissioner of Immigration and Naturalization was an indispensable party.

Judge Kaufman followed and elaborated upon the dis-

tinction we made in *Pedreiro* v. *Shaughnessy*, 2 Cir., 213 F. 2d 768, aff'd, 349 U. S. 48, between a challenge to deportability, as in *Pedriero*, and a claim that, notwithstanding deportability, the Attorney General should exercise his discretion in favor of the issuance of an order suspending deportation, as in *Vaz* v. *Shaughnessy*, 2 Cir., 208 F. 2d 70 and in the case now before us. Although the question is not free from doubt, we shall follow our reasoning in *Vaz* and more fully stated in the opinion below. While the Supreme Court may decide that the distinction no longer holds, we do not think this is to be spelled out of Mr. Justice Black's opinion in *Pedreiro*.

In any event, the decision below must be affirmed because, as a matter of law, plaintiff is not entitled to the relief he requests. For 8 U. S. C. A. § 155(c) (1950 [fol. 105] Pocket Part) permits his application for suspension of deportation to be considered only if he is eligible for citizenship. Plaintiff, however, admits that he signed a DSS Form 301: Application by Alien for Relief from Military Service. Plaintiff heard nothing further from his Draft Board until his country of citizenship became a belligerent and he was, consequently, no longer entitled to claim exemption as a neutral alien. Whether this was cause or coincidence, as the defendant and plaintiff respectively contend, is not material. Section 303(a) of Title 50 of the United States Code, Appendix provides that an alien who "has made application" to be relieved from military service "shall thereafter be debarred from becoming a citizen of the United States," and plaintiff made such an application and hence is not eligible for an order suspending deportation.

Affirmed.

[fol. 106-107] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LUIS ALVARO CEBALLOS (Y ARBOLEDA), Plaintiff-Appellant,

v.

EDWARD J. SHAUGHNESSY, District Director, etc., Defendant-Appellee.

JUDGMENT—FEB. 6, 1956

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

(s) A. Daniel Fusaro, Clerk.

[fol. 108] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 109] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—FILED JUNE 11, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~907~~ 71

LUIS ALVARA CEBALLOS (Y ARBOLEDA),

Petitioner,

against

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service at the Port of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BLANCH FREEDMAN & GLORIA AGRIN,
AND JAMES O. BERLINGER,
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New York 38, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

LUIS ALVARA CEBALLOS (Y ARBOLEDA),

Petitioner,

against

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service at the Port of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York, dismissing the petitioner's complaint in which he had sought judicial review, pursuant to Section 10 of the Administrative Procedure Act of 1946 [5 U. S. C. §1009], of a final administrative order directing that he be deported and barring him from having the suspension of his deportation considered by the Attorney General of the United States under Section 19 (c) of the Immigration Act of 1917 by holding that petitioner was ineligible for naturalization and therefore statutorily ineligible for suspension of deportation.

Opinions Below

The opinion of the District Court is reported in 130 F. Supp. 30 and it is incorporated in the record at pages 23a to 27a. The opinion of the Court of Appeals is reported in 229 F. 2d 592; a copy of the opinion and judgment is hereto annexed as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was rendered on February 6, 1956. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. §1254(1).

Questions Presented

1. Whether the Attorney General and/or Commissioner of Immigration are indispensable parties to a suit, under 5 U. S. C. §1009, where effective relief without requiring action by either the Attorney General or the Commissioner can be afforded petitioner, by a finding and declaration by the court,

   (a) that the petitioner is not ineligible for naturalization under 50 U. S. C. (1946 Ed.) §303(a) and 50 U. S. C. App. §454(a) and, therefore, not statutorily ineligible for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended [8 U. S. C. (1946 Ed. Supp. V) §155(c)];

   (b) that the order for his deportation is invalid by reason of the fact that his application for suspension of deportation was not considered because of an erroneous administrative determination that he was statutorily ineligible therefor; and

   (c) that respondent is restrained and enjoined from deporting petitioner under the outstanding order of deportation.

2. Whether by the mere signing of an *Application by Alien for Relief from Military Service*, DSS Form 301, the petitioner has forfeited the right to naturalization, rendering him ineligible for suspension of deportation where such application was not acted upon by the local draft board, and he was not classified as exempt under such application nor relieved from liability for service by reason thereof, as required by law and the rules and regulations of the Selective Service System (32 C. F. R. Cum. Supp. 1939-43).

Statutes Involved

The relevant portions of the statutes involved are as follows:

8 U. S. C. (1946 Ed. Supp V) §155(c)[1] [Sec. 19(c) of the Immigration Act of 1917 as amended].

> In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the attorney general may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen * * * who is a spouse, * * * or minor child of such deportable alien; * * *.

50 U. S. C. App. (1946 Ed.) §303(a)[2] [Sec. 3(a) of the Selective Training and Service Act of 1940 as amended].

> Except as otherwise provided in this act, every male citizen and every other male person residing in the

---

1. Now 8 U.S.C. §1254(a)(1).
2. Now 50 U.S.C. App. §454(a).

United States, who is between the ages of 21 and 45 * * * shall be liable for training and service in the land and naval forces of the United States: *Provided*, that any citizen or subject of a neutral country shall be relieved from liability for training and service under this act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

8 U. S. C. §1426 [Sec. 315 of the Immigration and Nationality Act of 1952].

Citizenship denied alien relieved of service in armed forces because of alienage; conclusiveness of records.

(a) Notwithstanding the provisions of section 405 (b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

Statement of the Case

The petitioner is an alien, 42 years of age, a native of Colombia (R. 9a, 88a). He is married to a native-born United States citizen and is the father of two citizen children, boys, now aged 4½ and 2 years.[3] He is a cultured man of considerable business acumen, the president of a New York export-import company, and earns a substantial income (R. 84a). It is conceded that he is a man of good moral character with an unblemished record (R. 79a, 83a, 92a). He lives with his family in a home which they own in New Rochelle, New York. He is the sole support of his wife and infant sons. It is also conceded that his deportation would cause serious economic detriment to them (R. 9a, 83a, 88a).

The petitioner's marriage took place in New York City on January 3, 1951. (R. 79a, 83a). Together with his wife, he traveled to Europe and returned on April 2, 1951. He was lawfully admitted until April 23, 1951 on a transit visa, in transit to Mexico where he had then been residing (R. 77a, 83a). The petitioner's intention to continue on to Mexico changed as a result of the condition of his wife, then pregnant, who became seriously ill after their entry. Her illness made further travel hazardous for her. Her pregnant state made her unwilling to leave her native land, where she had lived all her life, to bear her children on foreign soil. (R. 46a, 48a). Because of his wife's condition and attitude, the petitioner, on April 20, 1951, applied to the New York District of the Immigration and Naturalization Service to adjust his status to that of a permanent resident under 8 U. S. C. §155(c) [Sec. 19(c) of the Immigration Act of 1917]. Deportation proceedings were commenced against him immediately upon the expiration of his transit

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3. A third child has since been born and is now almost six months old.

visa on the ground that he was in the United States in violation of Sections 14 and 15 of the Immigration Act of 1924 in that, after his admission into the United States on a transit visa, he failed to maintain the transit status under which he was admitted (R. 3a). In those proceedings, he applied, as was his right, under 8 U. S. C. (1946 Ed. Supp. V) §155(c), for suspension of deportation, authorized by the statute where a deportable alien is of good moral character and not otherwise ineligible for naturalization and where deportation would result in serious economic detriment to a citizen spouse or minor child. (R. 88a).

The petitioner was administratively found to be deportable in that he remained in the country beyond the period for which he had been admitted. (R. 86a). He was further held to be statutorily ineligible for suspension of deportation by reason of being statutorily ineligible for citizenship, because, after registering pursuant to the Selective Service Act during a prior residency in the United States, "on August 26, 1943, he signed DSS Form 301, 'Application by Alien for Relief from Military Service.'" (R. 10a, 83a, 84a). On January 25, 1954, he was ordered to depart voluntarily from the United States within a period to be prescribed by the District Director, and upon failure to so depart, "without further notice or proceedings [to] * * * be deported from the United States in the manner provided by law." This order was affirmed by the Board of Immigration Appeals on October 19, 1954 (R. 98a). The petitioner's motion to the Board to reconsider was denied on February 17, 1955. (R. 102a). On March 9, 1955, the petitioner was directed by the respondent to depart by April 11, 1955.[4] (R. 15a).

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4. The Government, in the District Court, represented that it would take no action to effectuate this order, pending disposition of the litigation in that court. It has, to the present time, refrained from taking any such action.

The petitioner had signed the DSS Form 301: *Application by Alien for Relief from Military Service,* under the following circumstances. He had been lawfully admitted to the United States for permanent residence on February 24, 1942. Three months after his admission, he registered for the draft as required by the Selective Service Act of 1940, filling out the prescribed questionnaire, designated DSS Form 40. After registration, he inquired of his local draft board as to the possibility of his being placed in a Columbian or general Latin American group, which he understood was being formed within the United States Army. He was informed that his desire for such an assignment would be considered and that notification of the disposition of his request would be sent to him.

In June, 1943, over a year after his registration, the petitioner received, in the mail, from his local draft board, two sets of forms, DSS 304: *Alien's Personal History and Statement,* and DSS 302: *Application for Determination of Residence.* The petitioner filled out both forms, by typewriter, except for one item: No. 41 on Form 304. This item he left unanswered. He brought both forms to his local draft board, and before filing them, discussed again his request for assignment to a Colombian unit. In this connection, he was advised to insert the word "*do*" in the blank space in the unanswered item No. 41. He then and there, in his handwriting, complied with the suggestion made.

Item No. 41 was a printed statement, and as filled in by the petitioner, read:

> "I *do* [written in] object to service in the land and naval forces of the United States."

It also contained the following notice:

> "* * * If you are a citizen or subject of a neutral country and you do not wish to serve in the land or

> naval forces of the United States, *you may apply to your Local Board for an application by alien for relief from military service* (Form 301) which, when executed by you and filed with the Local Board, will relieve you from the obligation to serve in the land and naval forces in the United States, but will also debar you from thereafter becoming a citizen of the United States." [Emphasis added.]

The petitioner, at the time he filed Form 304 and filled in Item No. 41 in the manner suggested, *did not apply* to his local board for an application to be relieved from military service (DSS Form 301), nor did he execute such an application. However, two months later, unsolicited, the draft board on its own initiative, sent him, by mail, a set of DSS Forms 301 completely filled out with instructions to sign and return them to the draft board.

The petitioner went with the forms to his draft board and, after further discussion there, signed them at the draft board with the understanding that this was the procedure required by the draft board to consider his request for assignment, if feasible, to a Colombian or other Latin American contingent. He returned home to await further instructions.

The petitioner never received any notice of action taken on the application, DSS Form 301, and in fact, his selective service record discloses that he was never classified IV-C, the category of an alien who was declared by the Selective Service to be exempt or relieved from military service because of having executed a DSS Form 301. On the contrary, in January, 1944, the petitioner received notice from his board that he had been classified I-A and instructed to appear for a pre-induction physical examination. After examination, he was rejected as physically unfit for service due to a chronic kidney ailment. In March, 1944, he was reclassified IV-F (R. 10a, 14a, 30a, 44a, 65a, 74a).

After the IV-F classification, with permission of the draft board, and until April, 1951, the petitioner traveled to Mexico continually and was permitted to reenter the United States each time without let or hindrance (R. 41a, 71a). Since the commencement of these proceedings against him, he has resided continuously in the United States with his wife and children (R. 77a).

The instant action was begun in the United States District Court for the Southern District of New York to secure a declaration that the petitioner is not statutorily ineligible for suspension of deportation in that, as a matter of law, he is not debarred from citizenship. A declaration was also asked that the order of deportation against the petitioner is invalid and ineffective unless and until, having thus removed the administrative ruling which creates a statutory bar to consideration of his application for suspension of deportation by the Attorney General, such consideration is had and a determination adverse to the petitioner made. The action sought also the auxiliary relief of an injunction against the petitioner's deportation under the deportation order, unless or until the occurrence of such eventualities. Jurisdiction of the Court was invoked under 5 U. S. C. §1009 and 8 U. S. C. §1329.

The District Court did not consider or rule upon the substantive issues. It dismissed the complaint exclusively on the ground "that the Attorney General of the United States and/or the Commissioner [of Immigration] are indispensable parties to the instant action" (R. 25a). The Court below sustained the holding of the District Court, although it conceded that in light of this Court's decision in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48 (1955), "the question is not free from doubt." And, in spite of having thus ousted itself of the jurisdiction to decide the merits of the cause by its own ruling, it nevertheless held that, on the merits the petitioner was not entitled to the relief he requested.

Reasons Why Certiorari Should Be Granted

There are two separate and distinct rulings in the decision of the court below: (1) jurisdictional and (2) substantive. As to both, the lower court's decision presents good cause to move this Court to exercise its discretion in favor of granting the writ of certiorari prayed by the petitioner.

1. *On jurisdiction*: The holding of the Court of Appeals that the Attorney General is an indispensible party to the action commenced by the petitioner is by that court's own admission "not free from doubt" in the light of this Court's recent decision in *Shaughnessy* v. *Pedreiro, supra.* Its resolution of that "doubt" brings the decision into direct conflict with *Shaughnessy* v. *Pedreiro, supra*, and *Williams* v. *Fanning*, 332 U. S. 490 (1947). Moreover, it creates a conflict with decisions of the courts in the Ninth Circuit whose approach to the same subject matter is evidenced by the cases of *Jiminez* v. *Barber*, 226 F. 2d 449 (C. A. 9th, 1955) and *Accosta* v. *Landon*, 125 F. Supp. 434 (D. C. S. D. Calif. C. D. 1954). Were the decision of the Court of Appeals for the Second Circuit to be permitted to stand, it would be precedent for compelling thousands of litigants, under the immigration laws alone, to seek needed relief in the courts of the District of Columbia, although this court itself has indicated that as a practical matter, effective relief may be had against a subordinate official who may be brought before a local court.

2. *On the merits.* The decision of the court below is squarely in conflict with that of *United States* v. *Bazan*, 228 F. 2d 455 (App. D. C., 1955). The law involved was designed to create a privilege, *i.e.* relief of a neutral alien from military service, for which the alien must pay with the forfeiture of another privilege, i.e. his eligibility for United States citizenship. The decision of the lower court so construes the law as to create an unconscionable imbalance in

the administration thereof, avoided by the Court of Appeals for the District of Columbia, in that it imposes the forfeiture whether or not the alien was granted the privilege for which it is to be exacted. Such a harsh and extreme construction of the law, running counter to the general doctrine that the law abhors a forfeiture (*Washingtonian Pub. Co.* v. *Pearson*, 306 U. S. 30, 41; *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10) and which will adversely affect the lives of many aliens throughout the land to whom it can be made to apply, should not be permitted to subsist as a precedent by this Court.

ARGUMENT

1. The Attorney General and/or the Commissioner of Immigration are not indispensable parties to this suit.

A misconception of the district court, perpetuated by the court below as to the right the petitioner seeks to vindicate, the relief which could ameliorate his situation, and the relief he sought, dictated its election to follow *Vaz* v. *Shaughnessy*, 208 F. 2d 70 (C. A. 2d, 1953) rather than *Shaughnessy* v. *Pedreiro*, *supra*, both of which measure the indispensability of parties by the basic standards established in *Williams* v. *Fanning*, *supra*. The decision of this Court in *Shaughnessy* v. *Pedreiro*, took such a view of "practical considerations" which, "under [its] former cases" were made to govern a determination of indispensability of parties, as to eliminate such a choice, as was made by the court below, from judicial cognizance. But whether or not this Court's *Pedreiro* decision is read to supersede the lower court's decision in *Vaz* v. *Shaughnessy*, *supra*, the relief to which the petitioner is entitled and which he requires and seeks sets this action apart from

Vaz, and calls for its determination on the authority of *Shaughnessy* v. *Pedreiro, supra* and *Williams* v. *Fanning, supra.*

The lower courts, in effect, held the Attorney General, in whom the statute rested exclusive power to suspend deportation [8 U. S. C. (1946 Ed. Supp. V) §155, now 8 U. S. C. §1254], to be an indispensable party to this action because he was the sole official who could effect a suspension of the petitioner's deportation. This ruling was apparently based on the mistaken legal notion, developed by the District Court, that to compel the Attorney General to suspend deportation was the "*sine qua non* of effective relief in this situation" (R. 26a) and that, therefore, the petitioner sought to compel the "exercise of [his] discretionary power to suspend deportation" (R. 26a).

The right which the petitioner seeks to enforce by this action, however, is not the ultimate right to have the Attorney General so exercise his discretion as to suspend his deporation—although that might, indirectly, be the inevitable effect of this suit. It was the penultimate right "to an exercise of the Attorney General's discretion on [his] application" for suspension, of which he was deprived "because the Attorney General's subordinates erroneously thought he was 'statutorily ineligible' for suspension of deportation" [*Accosta* v. *Landon*, 125 F. Supp. 434, 441 (D. C. S. D. Calif. C. D. 1954)] and the co-relative right not to be deported because that "condition precedent" to the "effectiveness" of the order of deportation against him had not been met.

The administrative ruling in this case that the petitioner was statutorily ineligible for suspension in that he is ineligible for citizenship inhibited consideration by the Attorney General of the petitioner's application for suspension of deportation.

> Under §19(c) of the Immigration Act the exercise of the Attorney General's appropriate discretion in suspending deportation is prohibited in the case of aliens ineligible for citizenship. The alien is determined to have a proscribed status by [an] administrative ruling of ineligibility. * * * [T]he alien can remove the bar to consideration of suspension only by a judicial determination of his eligibility for citizenship. *McGrath* v. *Kristensen*, 340 U. S. 162, 169 (1950).

The petitioner instituted this action for a declaration which would "remove the bar to consideration of suspension by the Attorney General," erected by the erroneous administrative ruling on his suspension application, and an injunction against his deportation because such consideration had not been had. The efficacy of the action, were he to succeed, would be two-fold. First, it would result in a judicial declaration such as that envisioned by the Supreme Court in the *Kristensen* case:

> * * * a determination that [he] is not barred from citizenship by §3(a) of the Selective Training and Service Act of 1940 only declares that he has such status as entitles him to consideration under §19(c) of the Immigration Act. (at 171).

Secondly, it would restrain the respondent, the District Director of Immigration and Naturalization, from effecting petitioner's deportation under the existing order and pending the determination of the application for suspension of deportation. *Accosta* v. *Landon*, *supra* at 141.

The petitioner is not, in the present posture of his application for suspension, entitled to the relief of having his deportation suspended. If his contention is correct that he is not statutorily ineligible for suspension, he has a right only to have suspension *considered* by the Attorney General and a right not to be deported until such consideration is had.

Were the bar to this consideration to be removed by court ruling, the proposed relief would not only be effective, but the only relief which the petitioner may presently claim.

The obstacle to consideration of his application by the Attorney General was not only *not* created by the Attorney General, but cannot be eliminated by him. It was a product of a decision of one of his subordinates, a Special Inquiry Officer [8 C. F. R. 242.61] made under the aegis of another of his subordinates who was before the court, the respondent District Director. Power to effect the petitioner's deportation, pending the removal of that obstacle, may be in the Attorney General, but it is, also in the hands of the District Director, and, undoubtedly, it may be effectively frustrated by restraint upon the District Director. *Shaughnessy* v. *Pedreiro, supra.*

In the *Vaz* case, Vaz's application for suspension was decided by the Commissioner of Immigration on "the assumption of the alien's eligibility for suspension of deportation and was a decision on the merits and not * * * solely on the basis of the alien's ineligibility for citizenship." *Vaz* v. *Shaughnessy, supra* at 72. The purport of the action was to contest the "appropriateness" of the Commissioner's conclusion, based on the assumption that "the plaintiff met the statutory requirements of eligibility," but that "the conceded facts precluded the granting of suspension" [*Id.* at 71], evaluated by this Court as "essentially a discretionary matter." *Pedreiro* v. *Shaughnessy, supra,* at 769. Vaz's application had been ripe for the exercise of discretion and that discretion had, in fact, been exercised. The relief which Vaz sought was the accomplishment of a suspension of his deportation by compulsion on the Commissioner or the Attorney General to reverse the conclusion which their discretion had dictated. By statute, such a reversal could be effected only by one or the other of those officers.

Under *Williams* v. *Fanning, supra,* read without the gloss put upon it by *Shaughnessy* v. *Pedreiro, supra,* it was possible for the court below, in the *Vaz* case, to have believed that an effective decree would "require [either the Commissioner or the Attorney General] to take action * * *". *Williams* v. *Fanning, supra,* at 493. The instant case, even under the same authority, calls for a conclusion other than that reached in *Vaz.* The relief requested here is not in the exclusive control of either the Attorney General or the Commissioner, and, in fact, is beyond their statutory authority. Effective relief will not require a decree against either of them "to take action". The declaratory aspects of a decree here, were it to be in the petitioner's favor, would simply free the Attorney General to take action in accordance with the governing statute, *i.e.,* to consider whether or not the petitioner's deportation should be suspended. Neither would it be necessary for the injunctive aspects of the decree, a prohibition against the petitioner's deportation, to run against the Attorney General. *Shaughnessy* v. *Pedreiro, supra.*

Accosta v. *Landon, supra,* presented a situation on all fours with the instant case. *See also*: *Jiminez* v. *Barber, supra.* As here, a Special Inquiry Officer denied an application for suspension of deportation on the ground that he "thought Accosta was statutorily ineligible therefore." (at 439). As here, an action was brought against the District Director of Immigration and Naturalization to review the legal validity of the administrative decision on eligibility and the deportation order whose continuing viability derived from that erroneous decision. The court in the *Accosta* case declared the administrative decision to be contrary to law and enjoined enforcement of the deportation order thus derivatively invalid, stating:

> The statutes * * * and the federal regulations, * * * entitle a deportable alien who has made timely applica-

tion for suspension of deportation to an exercise of the Attorney General's discretion on such application. Here Accosta was deprived of the exercise of the discretion because the Attorney General's subordinates erroneously thought he was "statutorily ineligible" for suspension of deportation.

The courts may not suspend the deportation of a deportable alien as that discretionary power is vested solely in the Attorney General, 8 U. S. C. A. §1254. *However, when the Attorney General is required as a condition precedent to an order of deportation to exercise his discretion with respect to the suspension of deportation, the validity of the order must rest upon the needed exercise of discretion. If it is lacking, the order is ineffective.* (at 441) [Emphasis added.]

The District Court and the court below in the instant case hesitated to follow the pattern of the *Accosta* case for fear that the relief of enjoining deportation as the auxiliary aid to a declaration of the legal invalidity of the administrative determination of the petitioner's statutory ineligibility for suspension would be ineffective. The District Court, for example, declared.

> *Effective* relief cannot be granted merely by preventing the District Director from deporting an admittedly deportable alien. * * * Without compelling the Attorney General to exercise such discretion, the plaintiff will continue in the status *ad infinitum* of an alien clearly deportable for failure to continue in transit to Mexico. The District Director can never alter plaintiff's status as an admittedly deportable alien; only the attorney general, *notwithstanding such deportability*, can suspend his deportation. (26a) [Court's emphasis.]

This Court, in *Shaughnessy* v. *Pedreiro*, *supra*, had just such a technical consideration urged upon it. It noted:

"It is argued, however, that the Commissioner should be an indispensable party because a judgment against a District Director alone would not be final and binding in other immigration districts." (at 53). The Court refused to be bound by such formalism, and, on the basis of "practical considerations", ruled:

> [W]e need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by immigration authorities. *Id.*

It is no less proper an assumption that, in the situation presented by the instant case, a declaratory judgment that the plaintiff is not ineligible to United States citizenship and eligible for suspension would be "lightly disregarded" and the alien permitted to remain "in the status *ad infinitum* of an alien clearly deportable" by immigration standards, but undeported for failure of the "condition precedent" to the "effectiveness" of the outstanding order of deportation. In any event, the restraint on the alien's deportation would serve to enforce his right not to be deported under an order which has no legal effectiveness because the Attorney General had not exercised his discretion with respect to the application for suspension of deportation. To the extent that the instant action is, derivatively, an attack on the order of deportation [*see*: *Accosta* v. *Landon*, *supra*], the District Director is a proper party to the suit, and, under *Shaughnessy* v. *Pedreiro*, *supra*, neither the Attorney General nor the Commissioner are indispensable parties. To the extent that the court below, in *Vaz* v. *Shaughnessy*, *supra*, did not view the challenge there in such perspective, that decision rests upon an infirm legal base.

That error aside, however, it is quite clear that this Court in the *Pedreiro* case did not contemplate that its

rationale should countenance the distinction in result, maintained by this Court, between *Pedreiro* and *Vaz*. *See*: *Pedreiro* v. *Shaughnessy, supra,* at 769. This Court not only did not distinguish between *Pedreiro* and *Vaz*, as did the court below [*id.*], but it lumped both types of cases in stating its rejection of the Government's claim to the indispensability of the Commissioner as a party. At page 52, the Court stated: "We also reject the Government's contention that the Commissioner of Immigration and Naturalization in an indispensable party to an action for declaratory relief." Footnote 7 states: "Compare *Paolo* v. *Garfinkel,* 200 F. 2d 280; *Rodriquez* v. *Landon,* 212 F. 2d 508." The *Paolo* case was an action, like *Pedreiro* to review the validity of a deportation order. The *Rodriquez* case, however, was a suit not even like the instant case which seeks merely to clear the way of the bar created by subordinate officials to consideration of suspension by the Attorney General, but one like *Vaz* where the Commissioner, after consideration and in the exercise of his discretion, denied an application for suspension. Most importantly, however, the rational evaluation of practicalities adopted by the Supreme Court in *Pedreiro* override the theoretical fears which governed the decision of the court below in *Vaz* and eliminate *Vaz* as a valid authority.

Whether or not, therefore, this case is a *Pedreiro* case or a *Vaz* case is rendered of no moment by the authority of *Shaughnessy* v. *Pedreiro, supra.* But, if the distinction is held to persist, the instant case is, at least, not a *Vaz* case in that an effective decree here will require no action to be taken by the Attorney General or Commissioner. On the contrary, as in *Williams* v. *Fanning, supra,* as construed and extended by *Shaughnessy* v. *Pedreiro, supra,* "it will effectively grant the relief desired by expending itself on the subordinate official who is before the court."

The court below was, therefore, clearly in error in its determination that the Attorney General or Commissioner of Immigration and Naturalization were indispensable parties to this suit. Proper parties were before the court and no indispensable party was lacking. The petitioner's complaint should have been considered on the merits and the relief it requested granted.

2. Petitioner, not having been relieved of liability for military service as required by law and prescribed by Selective Service regulations is not debarred from citizenship and is not ineligible for suspension of deportation.

The Court below held that petitioner was statutorily ineligible for suspension of deportation because it was of the opinion that the mere signing by petitioner of an *Application to be Relieved from Military Service* operated, *ipso facto* to debar him from citizenship irrespective of whether or not he was thereafter relieved of liability for and exempted from such military service by reason of the said application.

Petitioner contends that the Court is in error, both under Section 3(a) of the Selective Service Act of 1940 [50 U. S. C. App. (1946 Ed.) §303(a)] and §315 of the Immigration and Nationality Act of 1952 [8 U. S. C. §1426]. The law now is, and at all times pertinent herein has been that permanent ineligibility for citizenship results only when the two-fold factors exist: application for *and* relief from military service because of alienage. Since petitioner was never exempted from or relieved of liability from military service because of alienage the decision of the court below was error and should be reversed.

A. Application and relief from military service are both required as prescribed under §3(a) of the 1940 Selective Service Act [50 U. S. C. App. (1946 Ed.) 303(a)] and the applicable Selective Service regulations as a bar to naturalization.

Since the adoption of the Selective Service Act of 1918,[5] the law has made provision for the exemption from service and training in the United States armed forces of aliens, nationals of neutral nations, residing in the United States. The concomitant of *exemption,* however, was perpetual debarment from United States citizenship. Court decisions early recognized that debarment from citizenship was a penalty for relief from liability for military service and that where no such relief was had, there existed no warrant for the exaction of the penalty. *In re Gustavson,* 300 F. 251, 252 (D. C. S. D. Calif. 1924) held:

> The intention of the Act plainly was to fix a penalty where an alien declarant was relieved from military service; * * * in this case the government did not relieve the declarant from service, * * * hence no exemption right was accorded him and he should *not* be held to have incurred the penalty affixed. [Emphasis added.]

Accord: In re Siem, 284 F. 868 (D. C. D. Mont., 1922), *aff'd* 299 F. 582 (C. C. A. 9th, 1924).

The authorities, construing subsequent legislation substituting the 1918 provision, have consistently understood

5. Section 4, Act of July 1918 [40 Stat. 88] provided:
> * * * a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, * * * and he shall forever be debarred from becoming a citizen of the United States.

that a debarment from citizenship may occur only where the two factors, *in the conjunctive,* appear: application for relief from military service *and* exemption under the application, by classification in the prescribed exempt category therefor in accordance with the statute and promulgated selective service regulations. In every case where a forefeiture of the right to citizenship was declared both factors were present.[6] In no reported case was the penalty of debarment imposed where no relief from military service was a consequence of the application for exemption.

The current law on the subject is now also part of the Immigration and Nationality Act of 1952, Section 315 [8 U. S. C. §1426]. It was put there because as reported by the Senate Judiciary Committee, it was felt "that this provision is in line with the general concept of the Nationality Act" and "should be incorporated in the proposed bill so that all requirements for naturalization may be found in the same Act." [Sen. Jud. Rep. No. 1515, 81st Congress 2nd Sess. p. 725].

The legislative history of its enactment further reveals that Section 315 as written and adopted was not intended to nor did it in fact constitute a change in the law as it had theretofore prevailed. On the contrary it represented congressional understanding of the extant law. The committee,

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6. *Barreiro* v. *Brownell*, 215 F. 2d 585, 587 (C. A. 9th, 1954); *Benzian* v. *Goodwin*, 168 F. 2d 952, 954 (C. A. 2, 1948); *In re Mauderli*, 122 F. Supp. 241, 242 (D. C. N. D. Fla., 1954); *In re Ballester*, 119 F. Supp. 629, 631-2 (D. C. D. P. R., 1954); *Petition of Berini*, 112 F. Supp. 837, 838 (D. C. E. D. N. Y., 1953); *Petition of Miranda*, 111 F. Supp. 481 (D. C. E. D. N. Y., 1953); *In re Molo*, 107 F. Supp. 137 (D. C. S. D. N. Y., 1952); *Application of Mannerfrid*, 101 F. Supp. 446, 447 (D. C. S. D. N. Y., 1951); *In re Bartenbach*, 82 F. Supp. 649 (D. C. W. D. Pa., 1949); *Petition of Perez*, 81 F. Supp. 591 (D. C. E. D. N. Y., 1948). The cases cited by the Board of Immigration Appeals (97a) are among those cited here.

in recommending its passage, described it as embodying "the essential provisions of Section 4(a) of the Selective Service Act of 1948" [Sen. Jud. Rep. No. 1515, supra p. 717]. Indeed, Section 4(a) has remained on the statute books. It has not been repealed or replaced by Section 315; both provisions remain as companion statutes. And Section 4(a) was a re-enactment in *haec verbae* of Section 3(a) of the Selective Training and Service Act of 1940 [50 U. S. C. (1946 Ed.) App. 303, (a)] under which petitioner here had signed the application.

It is therefore significant that Section 315 is explicit in its incorporation of both factors—application and relief—*in the conjunctive*: "any alien who applies or has applied for exemption * * * on the ground that he is an alien, *and* is or was relieved * * * on such ground, shall be permanently ineligible to become a citizen of the United States." This law has been construed in a manner warranted by its clearly expressed language:

> * * * it will be seen that two conditions are requisite to the permanent ineligibility to citizenship on the part of an alien; (a) the application for exemption on the ground of alienage, and (b) that he "was relieved or discharged from such training or service on such ground."
>
> These requisites are not stated in the disjunctive, and if either fails the statutory ineligibility does not become automatic, for one is of equal importance to the other. *Petition of Caputo,* 118 F. Supp. 870, 871 (D. C. E. D. N. Y., 1954).

It must consequently follow that former Section 3(a) now Section 4(a) also requires as a condition for forfeiture of eligibility for naturalization both application *and* exemption. Otherwise Section 4(a) and Section 315 are in conflict and incompatible.

The petitioner did sign DSS Form 301, *Application by Alien for Relief from Military Service.* He was never, however, classified as exempt or granted relief from military service and training as a consequence of the execution of this application form. That he was not relieved from service by virtue of his alienage cannot be disputed.

The regulations operative at the time the petitioner signed DSS Form 301 established a specific *modus operandi* to effect, under the Selective Service law, an alien's exemption from military service because of alienage. Section 622.43(b) of 32 C. F. R. (Cum. Supp. 1943) provided that an alien registrant of a neutral country who files a DSS Form 301 with his local board "shall be placed in Class IV-C."[7] Section 623.1 of the regulations prescribed prompt classification of a registrant in accordance with stated principles. Section 623.61 made mandatory the mailing to the registrant of notice of his classification, the proper recording in the Selective Service files of such classification and of the mailing to him of the notice of classification. Not until all of these steps had been completed was the alien classified as exempt and exempted. Until the completion of the prescribed classification procedure his liability for service and training remained unimpaired.

None of the specified steps leading to exemption were taken with respect to the DSS Form 301 signed by the petitioner. He was at no time classified IV-C; the Selective

7. §622.43(b) provides: "When an alien registrant who is a citizen or subject of a neutral country (see §601.12) at any time prior to his induction into the land or naval forces of the United States files with his local board an application by Alien for Relief from Military Service (Form 301) executed in duplicate, he shall be placed in Class IV-C. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service, and shall retain the duplicate in the registrant's cover sheet (Form 53)."

Service files do not record or in any way reflect a IV-C classification; no notice by mail or otherwise of a IV-C classification was sent to petitioner; and finally, the Selective Service files do not record the mailing of any such notice to petitioner [8] (R. 12a, 14a).

Quite the contrary, on January 27, 1944, five months after petitioner signed the DSS Form 30, he was classified 1-A —*available for military service*—notified of the classification and directed to appear for pre-induction physical examination on a date certain. The Selective Service files duly record this 1-A classification and the mailing of notice of that classification. The petitioner accepted the classification and appeared, as ordered, for physical examination. Only his failure to meet the physical requirements of the armed forces prevented him from serving and resulted in his reclassification as IV-F (R. 68a). The IV-F reclassification was made by the Board on March 2, 1944. Again, this reclassification with appropriate notice to appellant is duly recorded in the Selective Service files.

B. Petitioner is eligible for naturalization under the present statute §315 of the Immigration & Nationality Act, 1952 (8 U. S. C. §1426).

It is submitted that petitioner is not ineligible for naturalization by reason of having signed Selective Service Form DSS Form 301. The applicable statute is Section 315 of the 1952 Immigration & Nationality Act [8 U.S.C. §1426]. Subdivision (a) thereof reads as follows:

---

8. §315(b) of the 1952 Immigration & Nationality Act makes the records of the Selective Service System "conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien." (See *supra*, p. 4.)

> *Notwithstanding the provisions of Section 405(b)[9] of this Act, any alien who applies or has applied for exemption* or discharge from training or service in the Armed Forces of or in the National Security Training Corps of the United States *on the ground that he is an alien, and is or was relieved* or discharged from such training or service *on such ground, shall be permanently ineligible to become a citizen of the United States.* (Emphasis added.)

The italicized language in the aforesaid statute highlights that its provisions—and they alone—are to be determinative of the eligibility for naturalization of any alien where eligibility is in issue because of an application made at *any* time for exemption from military service on the ground of alienage.

The Court of Appeals for the District of Columbia recently so construed and applied this section in *United States* v. *Bazan*, 228 F. 2d, 456. In that case Bazan was applying for naturalization. It appeared that in November 1942, he had filed under Section 3(a) of Selective Service Act of 1940, Selective Service Application, Form DSS 301, claiming exemption as a neutral alien, from military service. He had sought to withdraw this application in September 1943, but the Selective Service refused to permit it. Apparently there was no evidence in the record before the court that he had been relieved from military service because of his application. On these facts the Court of Appeals ruled that he was not ineligible for citizenship and stated:

---

9. Section 405(b) provides: Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

> * * * to debar appellee (Bazan) from citizenship, the statute requires proof not only that he applied for exemption on grounds of alienage but also that he was relieved from serving for that reason. The examiner's legal conclusion that appellee was relieved from 'military service because of alienage' is not supported by any evidence in the present record, * * *. We think the total absence of any such essential evidence is a sufficient basis for affirming the District Court's order granting naturalization.

In the case at bar the record not only establishes that petitioner was "not relieved from military service because of alienage" but affirmatively shows that he was in fact classified I-A, held liable and called up for service.

Under the decision in the Bazan case the petitioner could not be held ineligible for citizenship because of signing DSS Form 301. This is in direct conflict with the holding of the court below.

CONCLUSION

Wherefore, in view of the gravity of the questions raised and their importance to many aliens residing here, petitioner prays that this petition for writ of certiorari to the United States Court of Appeals for the Second Circuit be granted, and that this Court review and reverse the order dismissing petitioner's complaint.

Respectfully submitted,

BLANCH FREEDMAN & GLORIA AGRIN
AND JAMES O. BERLINGER
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Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 130—October Term, 1955.

(Argued January 19, 1956 Decided February 6, 1956.)

Docket No. 23721

LUIS ALVARO CEBALLOS (Y ARBOLEDA),

Plaintiff-Appellant,

—v.—

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,

Defendant-Appellee.

Before:

MEDINA, HINCKS and WATERMAN,

Circuit Judges.

Appeal from a decision and order of the District Court of the United States for the Southern District of New York. Irving R. Kaufman, *Judge*.

Plaintiff appeals from the District Court's dismissal of his complaint for failure to join an indispensable party. Opinion reported in 130 F. Supp. 30. Affirmed.

Opinion

BLANCH FREEDMAN and GLORIA AGRIN, New York City, *for plaintiff-appellant.*

PAUL W. WILLIAMS, New York City (Harold J. Raby and Maurice N. Nessen, New York City, of counsel), *for defendant-appellee.*

MEDINA, Circuit Judge:

Plaintiff, an alien, seeks *inter alia* a declaratory judgment that he is not ineligible for naturalization under 8 U. S. C. A. §155(c) (1950 Cum. Pocket Part) and, in effect, a stay of deportation until the Attorney General exercises his discretion with respect to plaintiff's application for suspension of deportation. The complaint, brought against the District Director of Immigration, was dismissed below on the procedural ground that the Attorney General or the Commissioner of Immigration and Naturalization was an indispensable party.

Judge Kaufman followed and elaborated upon the distinction we made in *Pedreiro* v. *Shaughnessy*, 2 Cir., 213 F. 2d 768, aff'd, 349 U. S. 48, between a challenge to deportability, as in *Pedreiro*, and a claim that, notwithstanding deportability, the Attorney General should exercise his discretion in favor of the issuance of an order suspending deportation, as in *Vaz* v. *Shaughnessy*, 2 Cir., 208 F. 2d 70 and in the case now before us. Although the question is not free from doubt, we shall follow our reasoning in *Vaz* and more fully stated in the opinion below. While the Supreme Court may decide that the distinction no longer holds, we do not think this is to be spelled out of Mr. Justice Black's opinion in *Pedreiro*.

In any event, the decision below must be affirmed because, as a matter of law, plaintiff is not entitled to the

relief he requests. For 8 U. S. C. A. §155(*c*) (1950 Pocket Part) permits his application for suspension of deportation to be considered only if he is eligible for citizenship. Plaintiff, however, admits that he signed a DSS Form 301: Application by Alien for Relief from Military Service. Plaintiff heard nothing further from his Draft Board until his country of citizenship became a belligerent and he was, consequently, no longer entitled to claim exemption as a neutral alien. Whether this was cause or coincidence, as the defendant and plaintiff respectively contend, is not material. Section 303(a) of Title 50 of the United States Code, Appendix provides that an alien who "has made application" to be relieved from military service "shall thereafter be debarred from becoming a citizen of the United States," and plaintiff made such an application and hence is not eligible for an order suspending deportation.

Affirmed.

Judgment

(Filed—February 6, 1956)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February, one thousand nine hundred and fifty-six.

Present:

HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,

Circuit Judges.

LUIS ALVARO CEBALLOS (I. ARBOLEDA),

Plaintiff-Appellant,

vs.

EDWARD J. SHAUGHNESSY, District Director, etc.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO,
Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 71

LUIS ALVARO CEBALLOS (Y ARBOLEDA),

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE AT THE PORT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 71

LUIS ALVARO CEBALLOS (Y ARBOLEDA),

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service at the Port of New York,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported in 229 F. 2d 592; a copy of the opinion and judgment is shown in this brief at page 17.

The opinion of the District Court is reported in 130 F. Supp. 30 and is incorporated in the Transcript of Record at pages 18 to 23.

Jurisdiction

The judgment of the Court of Appeals was rendered on February 6, 1956. The petition for a writ of certiorari was filed on April 28, 1956 and granted on June 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

1. In a U. S. District Court suit to review the findings and order of the Immigration Service that the alien is not eligible to naturalization and therefore not eligible to suspension of deportation, and where he seeks to enjoin the District Director from deporting him, is the Attorney General and/or the Commissioner of Immigration indispensable parties or, is the District Director alone a sufficient party.

2. Whether an alien who claimed exemption from military service as a neutral in August, 1943 has forfeited the right to naturalization rendering him ineligible for suspension of deportation by the mere signing of an application for relief from military service (DSS Form 301), without being exempted or relieved from liability for such service as required by law and the rules and regulations of the Selective Service system (32 C. F. R. Cum. Supp. 1939-43) and section 3(a) of the Selective Training and Service Act of 1940.

Statutes Involved

The relative portions of the statutes involved are as follows:

Section 19(c) of the Immigration Act of 1917 as amended, 62 Stat. 1206, 8 U. S. C. 1946 Ed. Supp. V section 155 [now U. S. C. section 1254(a)(1)], provided in pertinent part:

> "In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen * * * who is the spouse * * * or minor child of such deportable alien * * *."

Section 405(a) of the Immigration and Nationality Act of 1952, provides in part:

> "* * * An application for suspension of deportation under Section 19 of the Immigration Act of 1917 as amended, * * * which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection * * *. Nothing in this Act * * * shall be construed to effect the validity of * * * any proceeding * * * which shall be valid at the time this Act shall take effect * * *."

Section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U. S. C. App. (1946 ed.) 303(a) [now 50 U. S. C. App. Sec. 454(a)] provided in part:

> "Except as otherwise provided in this Act, every male citizen and every other male person residing in the United States, who is between the ages of nineteen

and forty-five * * * shall be liable for training and service in the land and naval forces of the United States; *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *."

Section 405(b) of the Immigration and Nationality Act of 1952 provides:

"Except as otherwise specifically provided in Title III, (Nationality and Naturalization) any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect, shall be heard and determined in accordance with the requirements of law in effect when such petition was filed."

Section 315 of the Immigration and Nationality Act of 1952, 66 Stat. 242, 8 U. S. C. Sec. 1426, provides:

"(a) Notwithstanding the provisions of section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, *and is or was relieved or discharged* from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States. (Emphasis added.)

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

Section 101(a)(19) of the Immigration and Nationality Act of 1952, 66 Stat. 169, 8 U. S. C. 1101(a)(19), provides:

"(19) The term 'ineligible to citizenship', when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended * * *."

Statement of the Case

Petitioner is an alien 42 years of age, a native of Columbia, S. A. who entered the United States for the first time on February 24, 1942 for permanent residence. He registered for the draft in May 1942 as required by the Selective Training and Service Act of 1940. On June 16, 1943 he filled out the prescribed questionnaire DSS Form 304, which was a personal history statement containing printed questions (R. 70, 91). In answer to one of those questions he stated "I do object to service in the land and naval forces of the United States" The word "do" was written in the petitioner's own handwriting (R. 35, 64). Within two months thereafter, he received DSS Form 301 entitled "Application by an Alien for Relief from Military Service". This he signed on August 26, 1943 and de-

livered it in person to his Board. DSS Form 301 contained the following paragraph:

> "I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the Act of Congress approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States."

Petitioner never received notice of any action taken on his application DSS Form 301 and in fact, his selective service record discloses that he was never classified 4-C (exempt as a neutral alien) because of having executed the DSS Form 301. On the contrary, in January, 1944, the petitioner received notice from his Board that he had been classified 1-A and instructed to appear for pre-induction physical examination and he promptly and willingly appeared. After the examination he was rejected as physically unfit for service, due to a chronic kidney ailment and for that reason was reclassified in March, 1944 to 4-F (unfit for service). (R. 8, 11, 36, 61, 66).

Between his first entry in 1942 and his last re-entry on April 2, 1951, he had made several departures and re-entries. During one of the re-entries he was married in New York City on January 3, 1951 to a native born citizen of the United States (R. 29) and they promptly departed for France. On the said last re-entry April 2, 1951 he was in possession of a transit visa en route to Mexico. This kind of a visa permitted him to stay here only twenty-one days. Instead of departing within that time he decided to remain (R. 28).

Petitioner is the father of three children under six years of age and all born in New York City. He earns a substantial income and has purchased a home in New Rochelle, N. Y., where he lives with his wife and children and is their sole support. It is conceded that his deportation would cause serious economic detriment to them (R. 7, 74, 79).

Deportation proceedings were started against him on April 23, 1951 on the ground that he failed to depart within the time limit given him on his transit visa (R. 27). During the course of these proceedings he applied for suspension of deportation as he was privileged to do, under 8 U. S. C. Section 155(c), 1946 Ed. Supp. V. [Section 19(c) of the Immigration Act of 1917]. He sought this relief on the ground that deportation in his case would result in very serious economic hardship to his wife and children (R. 79). After several hearings and appeal to the Board of Immigration Appeals, he was found ineligible for naturalization and therefore not eligible for suspension of deportation in that, on August 26, 1943, while residing in the United States as a permanent resident, he claimed exemption from military service as a neutral alien (R. 70, 91).

In March, 1955 an action was begun in the United States District Court for the Southern District of New York against the District Director of the Immigration Service for a declaratory judgment declaring him to be eligible for suspension of deportation (R. 1, 12) and for a temporary injunction restraining the Director from taking him into custody for deportation (R. 6, 12). The government moved for dismissal of the complaint for failure to join the Attorney General and failure to state a cause of action (R. 13).

The District Court did not consider or rule upon the substantive issues. It dismissed the complaint exclusively on the ground "that the Attorney General of the United States and/or the Commissioner (of Immigration) are indispensable parties to the instant action" (R. 18). The Court of Appeals affirmed, although it conceded that in the light of this Court's decision in *Shaughnessy* v. *Pedreiro,* 349 U. S. 48 (1955), "the question is not free from doubt". The Court, nevertheless, adhered to the view that the Attorney General was a necessary party when suspension of deportation was involved. The Court of Appeals, in affirming the dismissal of petitioner's complaint for failure to state a cause of action (as well as for failure to join a necessary party) held that the mere making of the application for exemption as a neutral alien rendered petitioner ineligible to citizenship.

ARGUMENT

1. The Attorney General and/or the Commissioner of Immigration are not indispensable parties in this action.

This Court decided in *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, that the District Director alone is a sufficient party in an action to review the validity of a deportation order, since he is the person who would execute the order and that neither the Attorney General nor the Commissioner are indispensable parties.

The Government's brief in opposition to the granting of certiorari, at page 10 under "Argument" states clearly that it does not rely upon that aspect of the decision below which holds that the Attorney General is a necessary

party to an action for a declaratory judgment seeking review of the denial of suspension of deportation and it does not agree with the decision below which holds that the Attorney General is a necessary party in this action.

2. Petitioner, not having been relieved of liability for military service as required by law and prescribed by Selective Service regulations, is not debarred from citizenship and is not ineligible for suspension of deportation.

The Court below held that petitioner was statutorily ineligible for suspension of deportation because it was of the opinion that the mere signing by petitioner of an Application to be Relieved from Military Service operated *ipso facto* to debar him from citizenship irrespective of whether or not he was thereafter relieved of liability for and exempted from such military service by reason of the said application.

Petitioner contends that the Court is in error, both under Section 3(a) of the Selective Training and Service Act of 1940 (50 U. S. C. App. 1946 Ed.) Sec. 303(a) and Sec. 315 of the Immigration and Nationality Act of 1952 (8 U. S. C. Sec. 1426). The law now is and at all times pertinent herein has been, that permanent ineligibility for citizenship results only when the two-fold factors exist: application for *and* relief from military service because of alienage. Since petitioner was never exempted from or relieved of liability from military service because of alienage the decision of the court below was error and should be reversed.

A. Application and relief from military service are both required as prescribed under Sec. 3(a) of the 1940 Selective Training and Service Act [50 U. S. C. App. (1946 Ed.) 303(a)] and the applicable Selective Service regulations, as a bar to naturalization.

Section 4, Act of July 1918 (40 Stat. 88) provided:

> "• • • a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, • • • and he shall forever be debarred from becoming a citizen of the United States."

Since the adoption of the Selective Service Act of 1918, the law has made provision for the exemption from service and training in the United States armed forces of aliens, nationals of neutral nations, residing in the United States. The concomitant of exemption however, was perpetual debarment from United States citizenship. Court decisions early recognized that debarment from citizenship was a penalty for relief from liability for military service and that where no such relief was had, there existed no warrant for the exaction of the penalty. *In re Gustavson*, 300 F. 251, 252 (D. C. S. D. Calif., 1924) held:

> "The intention of the Act plainly was to fix a penalty where an alien declarant was relieved from military service; • • • in this case the government did not relieve the declarant from service, • • • hence no exemption right was accorded him and he should *not* be held to have incurred the penalty affixed."

Accord: *In re Siem*, 284 F. 868 (D. C. D. Mont., 1922), aff'd 299 F. 582 (C. C. A. 9th, 1924).

The authorities, construing subsequent legislation substituting the 1918 provision, have consistently understood that a debarment from citizenship may occur only where the two factors, in the conjunctive, appear: application for relief from military service and exemption under the application, by classification in the prescribed exempt category therefor in accordance with the statute and promulgated selective service regulations. In every case where a forfeiture of the right to citizenship was declared both factors were present. *Barreiro* v. *Brownell*, 215 F. 2d 585, 587 (C. A. 9th, 1954); *Benzian* v. *Goodwin*, 168 F. 2d 952, 954 (C. A. 2, 1948); *In re Ballester*, 119 F. Supp. 629, 631-2 (D. C. D. P. R., 1954); *Petition of Berini*, 112 F. Supp. 832, 838 (D. C. E. D. N. Y., 1953); *Petition of Miranda*, 111 F. Supp. 481 (D. C. E. D. N. Y., 1953); *In re Molo*, 107 F. Supp. 137 (D. C. S. D. N. Y., 1952); *Application of Mannerfrid*, 101 F. Supp. 446, 447 (D. C. S. D. N. Y., 1951); *In re Bartenbach*, 82 F. Supp. 649 (D. C. W. D. Pa., 1949); *Petition of Perez*, 81 F. Supp. 591 (D. C. E. D. N. Y., 1948). In no reported case was the penalty of debarment imposed where no relief from military service was granted.

The current law on the subject is now part of the Immigration and Nationality Act of 1952, Section 315 (8 U. S. C. Sec. 1426). It was put there because as reported by the Senate Judiciary Committee, it was felt "that this provision is in line with the general concept of the Nationality Act and should be incorporated in the proposed bill so that all requirements for naturalization may be found in the same Act." (Sen. Jud. Rep. No. 1515, 81st Congress 2nd Sess. p. 725.)

The legislative history of its enactment further reveals that Section 315 of the Immigration and Nationality Act of 1952, as written and adopted, was not intended to nor did it in fact constitute a change in the law as it had theretofore prevailed. On the contrary, it represented congressional understanding of the extant law. The committee, in recommending its passage, described it as embodying "the essential provisions of Section 4(a) of the Selective Service Act of 1948" (Sen. Jud. Rep. No. 1515, *supra*, p. 717). Indeed, Section 4(a) has remained on the statute books. It has not been repealed or replaced by Section 315 of the Immigration and Nationality Act of 1952; both provisions remain as companion statutes. And Section 4(a) was a re-enactment in *haec verbae* of Section 3(a) of the Selective Training and Service Act of 1940 [50 U. S. C. (1946 Ed.) App. 303 (a)] under which petitioner here had signed the application.

It is therefore significant that Section 315 of the Immigration and Nationality Act of 1952 is explicit in its incorporation of both factors—application and relief—in the conjunctive: "any alien who applies or has applied for exemption * * * on the ground that he is an alien, and is or was relieved * * * on such ground, shall be permanently ineligible to become a citizen of the United States." This law has been construed in a manner warranted by its clearly expressed language.

Two conditions are requisite: the application for exemption and a record that he was relieved or discharged from training or service. These requisites are not stated in the disjunctive, and if either fails, the statutory ineligibility does not become automatic, for one is of equal importance to the other (*Petition of Caputo*, 118 F. Supp. 870, 871, D. C. E. D. N. Y., 1954).

It must consequently follow that former Section 3(a) now Section 4(a) of the Selective Service Act and Regulations also requires as a condition for forfeiture of eligibility for naturalization both application and exemption. Otherwise Section 4(a) Selective Service and Section 315 Immigration and Nationality Act of 1952 are in conflict and incompatible.

The petitioner did sign DSS Form 301, application by alien for relief from military service. However, he was never classified as exempt or granted relief from military service and training as a consequence of the execution of this application form. That he was not relieved from service by virtue of his alienage cannot be disputed.

The regulations operative at the time the petitioner signed DSS Form 301 established a specific *modus operandi* to effect, under the selective service law, an alien's exemption from military service because of alienage. Section 622.43(b) of 32 C. F. R. (Cum. Supp., 1943) provided that an alien registrant of a neutral country who files a DSS Form 301 with his local board "shall be placed in Clas IV-C" (exempted and relieved). Section 623.1 of the regulations, prescribed prompt classification of a registrant in accordance with stated principles. Section 623.61 made mandatory the mailing to the registrant of notice of his classification and the proper recording in the Selective Service files of such classification. Not until all of these steps had been completed was the alien classified as exempt and exempted. Until the completion of the prescribed classification procedure his liability for service and training remained unimpaired.

None of the specified steps leading to exemption were taken with respect to the DSS Form 301 signed by the

petitioner. He was at no time classified IV-C (exempted and relieved). The Selective Service files do not record or in any way reflect a IV-C classification; no notice by mail or otherwise of a IV-C classification was sent to petitioner; and finally, the Selective Service files do not record the mailing of any such notice to petitioner (R. 11).

Quite the contrary, on January 27, 1944, five months after petitioner signed the DSS Form 301 he was classified 1-A— available for military service— notified of the classification and directed to appear for pre-induction physical examination on a date certain. The Selective Service files duly record this 1-A classification and the mailing of notice of that classification. The petitioner accepted the classification and appeared, as ordered, for physical examination. Only his failure to meet the physical requirements of the armed forces prevented him from serving and resulted in his reclassification as IV-F (R. 62) (physically defective). The IV-F reclassification was made by the Board on March 2, 1944. Again, this reclassification with appropriate notice to appellant is duly recorded in the Selective Service files.

Sec. 315(b) of the 1952 Immigration and Nationality Act makes the records of the Selective Service System "conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

B. Petitioner is eligible for naturalization under the present statute Sec. 315 of the Immigration and Nationality Act of 1952 (8 U. S. C. Sec. 1426).

It is submitted that petitioner is not ineligible for naturalization by reason of having signed Selective Service

DSS Form 301. The applicable statute is Section 315 of the 1952 Immigration and Nationality Act (8 U. S. C. Sec. 1426). Subdivision (a) thereof reads as follows:

> "* * * any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces of or in the National Security Training Corps of the United States on the ground that he is an alien, *and is or was relieved or discharged* from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States." (Emphasis added.)

The emphasized language in the aforesaid statute highlights that its provisions—and they alone—are to be determinative of the eligibility for naturalization of any alien where eligibility is in issue because of an application made at any time for exemption from military service on the ground of alienage.

The Court of Appeals for the District of Columbia in a case decided December 1, 1955, so construed and applied this section in *United States* v. *Bazan*, 228 F. 2d 455. In that case Bazan was applying for naturalization. It appeared that in November, 1942, he had filed under Section 3(a) of Selective Training and Service Act of 1940, Selective Service Application DSS Form 301 claiming exemption from service as a neutral alien. He had sought to withdraw this application in September, 1943, but the Selective Service refused to permit it. Apparently there was no evidence in the record before the court that he had been relieved from military service because of his application. On these facts the Court of Appeals ruled that he was not ineligible for citizenship and stated:

"* * * to debar appellee (Bazan) from citizenship, the statute requires proof not only that he applied for exemption on grounds of alienage but also that he was *relieved from serving* for that reason. The examiner's legal conclusion that appellee was relieved from 'military service because of alienage' is not supported by any evidence in the present record; * * * We think the total absence of any such essential evidence is a sufficient basis for affirming the District Court's order granting naturalization." (Italics added.)

In the case at bar the record not only establishes that petitioner was "not relieved from military service because of alienage" but affirmatively shows that he was in fact classified I-A, held liable and called up for service.

Under the decision in the *Bazan* case the petitioner could not be held ineligible for citizenship because of signing DSS Form 301. This is in direct conflict with the holding of the court below.

CONCLUSION

For the reasons stated above and because the questions raised are of great importance to a large number of aliens residing here, the order of the United States Court of Appeals for the Second Circuit and of the District Court, dismissing the petitioner's complaint should be reversed.

Respectfully submitted,

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Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(No. 130—OCTOBER TERM, 1955.)

(Argued January 19, 1956 Decided February 6, 1956)

Docket No. 23721

LUIS ALVARO CEBALLOS (Y ARBOLEDA),

Plaintiff-Appellant,

v.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,

Defendant-Appellee.

Before: MEDINA, HINCKS and WATERMAN, Circuit Judges.

Appeal from a decision and order of the District Court of the United States for the Southern District of New York. Irving R. Kaufman, *Judge*.

Plaintiff appeals from the District Court's dismissal of his complaint for failure to join an indispensable party. Opinion reported in 130 F. Supp. 30. Affirmed.

Opinion.

MEDINA, Circuit Judge:

Plaintiff, an alien, seeks *inter alia* a declaratory judgment that he is not ineligible for naturalization under 8 U. S. C. A. § 155(c) (1950 Cum. Pocket Part) and, in effect, a stay of deportation until the Attorney General exercises his discretion with respect to plaintiff's application for suspension of deportation. The complaint, brought against the District Director of Immigration, was dismissed below on the procedural ground that the Attorney General or the Commissioner of Immigration and Naturalization was an indispensable party.

Judge Kaufman followed and elaborated upon the distinction we made in *Pedreiro* v. *Shaughnessy*, 2 Cir., 213 F. 2d 768, aff'd 349 U. S. 48, between a challenge to deportability, as in *Pedreiro*, and a claim that, notwithstanding deportability, the Attorney General should exercise his discretion in favor of the issuance of an order suspending deportation, as in *Vaz* v. *Shaughnessy*, 2 Cir., 208 F. 2d 70 and in the case now before us. Although the question is not free from doubt, we shall follow our reasoning in *Vaz* and more fully stated in the opinion below. While the Supreme Court may decide that the distinction no longer holds, we do not think this is to be spelled out of Mr. Justice Black's opinion in *Pedreiro*.

In any event, the decision below must be affirmed because, as a matter of law, plaintiff is not entitled to the relief he requests. For 8 U. S. C. A. § 155 (c) (1950 Pocket Part) permits his application for suspension of deportation to be considered only if he is eligible for citizenship. Plaintiff, however, admits that he signed a

DSS Form 301: Application by Alien for Relief from Military Service. Plaintiff heard nothing further from his Draft Board until his country of citizenship became a belligerent and he was, consequently, no longer entitled to claim exemption as a neutral alien. Whether this was cause or coincidence, as the defendant and plaintiff respectively contend, is not material. Section 303(a) of Title 50 of the United States Code, Appendix, provides that an alien who "has made application" to be relieved from military service "shall thereafter be debarred from becoming a citizen of the United States," and plaintiff made such an application and hence is not eligible for an order suspending deportation.

Affirmed.

Judgment.

(Filed—February 6, 1956)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February, one thousand nine hundred and fifty-six.

Present: HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
Circuit Judges.

LUIS ALVARO CEBALLOS (y ARBOLEDA),
Plaintiff-Appellant,

vs.

EDWARD J. SHAUGHNESSY, District Director, etc.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO,
Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 907

LUIS ALVARA CEBALLOS (Y ARBOLEDA), PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE AT THE PORT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 2a-3a) is reported at 229 F. 2d 592. The opinion of the District Court (R. 23-27) is reported at 130 F. Supp. 30.

JURISDICTION

The judgment of the Court of Appeals was rendered on February 6, 1956. The petition for a writ of certiorari was filed on April 28, 1956. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien who claimed exemption from military service as a neutral in August 1943, and was not troubled by his draft board for some months thereafter until his native country became a belligerent, was debarred from citizenship under Section 3(a) of the Selective Service Act of 1940.

STATUTES INVOLVED

Section 19(c) of the Immigration Act of 1917, as amended, 62 Stat. 1206, 8 U.S.C. (1946 ed. Supp. V) 155, provided in pertinent part:

> In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen * * * who is the spouse, * * * or minor child of such deportable alien; * * *.

Section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U.S.C. App. (1946 ed.) 303 (a), provided in part:

> Except as otherwise provided in this Act, every male citizen and every other male person residing in the United States, who is be-

tween the ages of nineteen and forty-five * * * shall be liable for training and service in the land and naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

Section 315 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 242, 8 U.S.C. 1426, provides:

(a) Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability

for training or service because he was an alien.

Section 101(a)(19) of the Immigration and Nationality Act of 1952, 66 Stat. 169, 8 U.S.C. 1101 (a)(19), provides:

> (19) The term "ineligible to citizenship", when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended * * *.

STATEMENT

Petitioner is an alien who last entered the United States on April 2, 1951, on a transit visa en route to Mexico with permission to stay until April 23, 1951 (R. 35). Deportation proceedings were started against him on April 23, 1951 (R. 34) during the course of which he applied for suspension of deportation on the ground of economic hardship to his American citizen wife who was then expecting a child (see R. 46-47), and subsequently on the claim of hardship to his wife and two children (R. 64-65, 71-72), whom he supported from a business of which he was president, located in the City of New York, in which he had invested before his 1951 entry into the United States (R. 51, 72, 75).

After several hearings and appeals to the Board of Immigration Appeals, he was found ineligible for suspension because ineligible for citizenship in that, in August 1943, while admitted to the United States for permanent residence, he had claimed exemption from military service as a neutral alien (R. 77-102). He was granted the privilege of voluntary departure (R. 15, 86), but failed to depart.

In March 1955, he filed in the United States District Court for the Southern District of New York an action against the District Director of the Immigration Service for a declaratory judgment declaring him to be eligible for suspension of deportation (R. 1-6) and for a temporary injunction restraining the director from taking him into custody for deportation (R. 7-16). The government moved for dismissal of the complaint for failure to join the Attorney General and failure to state a cause of action (R. 16-17), incorporating by reference the administrative record (R. 18). The District Court dismissed the complaint on the ground that the Attorney General was a necessary party (R. 23-29).[1] The Court of Appeals affirmed. While admitting that, in view of the decision of this Court in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, there was doubt as to the validity of a distinction it had formerly drawn as to the necessity of joining the Attorney General where the issue was one of the discretion to be exercised in granting

[1] This was prior to the decision of this Court in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48.

suspension, as distinguished from a finding of deportability (see *Pedreiro* v. *Shaughnessy*, 213 F. 2d 768, 769), the court nevertheless adhered to the view that the Attorney General was a necessary party where suspension of deportation was involved. It also held, however, that the District Court's decision had in any event to be affirmed because petitioner, as a matter of law, was not entitled to the relief he sought (Pet. 2a-3a).

On the issue of petitioner's ineligibility for citizenship and consequent disqualification for suspension under Section 19(c) of the Immigration Act of 1917 (as amended),[2] the following facts, shown by the administrative record, are undisputed. Petitioner, then a native and citizen of Colombia,[3] was admitted to the United States for permanent residence in February 1942 (R. 42, 65), when he was 28 years old. In May 1942, he registered under the Selective Training and Service Act. One June 16, 1943, in his personal history statement, he stated "I *do* object to service in the land and naval forces of the United States."

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[2] Since petitioner's application for suspension was made before the effective date of the Immigration and Nationality Act of 1952, it is governed by the prior Act, under Section 405 of the 1952 Act (the savings clause). Petitioner was in no position to file a new application for suspension under the 1952 Act because he did not have the minimum residence requirements necessary for suspension under that Act. The standard of the 1917 Act (as amended) of "serious economic detriment" to dependents has, under the 1952 Act, been changed to "exceptional and extremely unusual hardship."

[3] He subsequently became a citizen of Mexico (R. 55).

The word "do" was written in petitioner's handwriting (R. 42, 73). Within two months thereafter, he received DSS Form 301, entitled "Application by an Alien for Relief from Military Service". That form contains the following paragraph:

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. I have not filed a declaration of intention to become a citizen of the United States.

Petitioner executed the form under oath on August 26, 1943, before a selective service official (R. 42). He was then employed as a translator by the Union Carbide and Carbon Corporation (R. 42). On November 26, 1943, Colombia became a co-belligerent and petitioner's right to exemption from military service as a neutral alien terminated. In January 1944, he was classified I-A, but was subsequently rejected for service because of physical defects (R. 40, 70).

In explanation of these facts, petitioner, at the first hearing in the deportation proceedings held on July 31, 1951, stated that he went to his draft

board and "was presented with Form 301 for signature"; that it was his understanding that it was a temporary deferment until he would decide whether he wanted to serve in the Colombian or American army (R. 39-40). He admitted that before the American consulate in Mexico he had denied having signed a Form 301, but said he did so because he did not believe it was still in effect (R. 40-41). He said that when he stated in his personal history statement that "I *do* object to service in the land or naval forces of the United States" he meant he was to serve in the Colombian army (R. 43). He testified that he had talked with other Colombians and, "not being able to ask anybody in the draft board about what was the best procedure to follow" (R. 43), it was his idea that he was going to be given an opportunity to fight in a squadron originating from Latin America (R. 43).

At the reopened hearing held on January 25, 1954, petitioner testified that in May 1942, a short time after he registered, he lost his registration card and went to the draft board to get a copy and notify them of a change of address. Contrary to his prior testimony that he could not talk to anyone at the draft board, he testified at the later hearing that he discussed with the draft board the problem of serving "in a division of Colombians within the United States Army" (R. 67). After he received his personal history statement, he again discussed the problem with the draft board and inserted the word "do", as to objection to

service, "on the understanding that there were going to set this—make up this particular group" (R. 68). He testified that he did not desire relief from military service; that the Form 301 was sent to him in the mail without his request; that after receiving it he went to the draft board and again discussed the matter of his serving in a particular division of the United States Army. He said he did not understand that he was asking to be relieved from military service (R. 69-70). He could not recall with what official at the draft board he had spoken (R. 72).

The hearing officer, both after the initial hearing (R. 80-81) and after the reopened hearing (R. 82-86), found petitioner ineligible for suspension by virtue of his application for relief from service. The Board of Immigration Appeals affirmed in a lengthy opinion (R. 87-98) in which it pointed out the discrepancies in petitioner's testimony, finding that he exhibited "such a selective attitude * * * toward facts that his candidness must be questioned" (R. 95). As to the argument that there was no competent evidence that petitioner had been granted exemption from service as the result of signing Form 301, the Board of Immigration Appeals noted that the draft board did not communicate with petitioner after he filed the exemption form on August 26, 1943, until after Colombia became a belligerent on November 26, 1943, but that very soon thereafter he was called for service in January 1944. It found in this combination of facts "some evidence that he re-

ceived the exemption he applied for" (R. 96-97). On rehearing, it further pointed out that, under the applicable Selective Service Regulation, 32 C.F.R. 622.43(b), petitioner could not have been legally inducted while Colombia remained a neutral (R. 102). And, in any case, it ruled that under Section 3(a) of the Selective Training and Service Act of 1940, as amended (see *supra*, pp. 2-3), the filing of the application was itself a bar to naturalization (R. 97).

The Court of Appeals, in affirming the dismissal of petitioner's complaint for failure to state a cause of action (as well as for failure to join a necessary party), held that the making of the application for exemption as a neutral alien itself rendered petitioner ineligible to citizenship (Pet. App. 3a).

ARGUMENT

1. The government does not rely upon that aspect of the decision below which holds that the Attorney General is a necessary party to an action for a declaratory judgment seeking review of the denial of suspension of deportation. In its decision in *Pedreiro* v. *Shaughnessy*, 213 F. 2d 768, 769, holding that the Attorney General was not a necessary party to a proceeding to review an order of deportation, the Second Circuit had distinguished its prior holding in *Vaz* v. *Shaughnessy*, 208 F. 2d 70, on the ground that that case "involved an attempt by a concededly deportable alien to review an order holding him not eligible for suspension of deportation, essentially a discretionary matter",

However, as we read this Court's decision in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, the question of indispensability of parties does not turn on the nature of the decision attacked, but on the ability and authority of the party before the court to effectuate the relief which the alien seeks. Here, petitioner seeks to have the order of deportation recalled and to enjoin the district director from taking him into custody for deportation. Since the district director is the person who would execute the deportation, we think that, under this Court's *Pedreiro* decision, he is a sufficient party. This will be the position of the government in future cases.

2. But the question of indispensability need not be reached in this case in view of the alternative holding of the Court of Appeals that, from the face of the pleadings which incorporated by reference the administrative record, it appears that "as a matter of law" petitioner is not entitled to the relief which he seeks.

(a). Actually, the particular substantive question decided by the Court of Appeals and presented by petitioner—whether an alien who filed an application for exemption under Section 3(a) of the Selective Training and Service Act of 1940 was rendered ineligible to citizenship whether or not he was actually granted exemption as a neutral alien—is also academic as raised in this case. As the Board of Immigration Appeals noted in its opinion (see Statement, *supra*, pp. 9-10), petitioner, who filed his claim to exemption on August 26,

1943, was not troubled by his draft board for the three month period before Colombia became a belligerent on November 26, 1943, but a little more than a month after that event he was classified in I-A, in January 1944. Considering the known demand for recruits in the crucial period of 1943, and the quick action of the board after Colombia's belligerency, it is evident that petitioner was in fact relieved from service because of his filing of DSS Form 301, whether or not the draft board went through the mechanics of classifying him IV-C, as to which there is no evidence in the record. Since it is admitted that if petitioner both claimed and obtain exemption as a neutral alien he was ineligible to citizenship and disqualified for suspension under the 1917 Act, petitioner, on the basis of the undisputed facts, was not entitled to the relief sought in his complaint.

(b). If it becomes necessary to reach the question of whether a neutral alien who has claimed exemption, but whose request was not acted upon, was ineligible to citizenship under Section 3(a) of the Selective Training and Service Act of 1940, we think the court below was correct in holding that the application was itself a bar to citizenship. Section 3(a) provided for the mandatory exemption from service of a neutral alien making application for relief, and then provided expressly that "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States" (see *supra*, p. 3). By the terms of the statute, the *application* is the bar to

citizenship. Decisions dealing with applications for exemption under Section 3(a) have spoken, in the terms of the statute, of the bar to citizenship arising from the application, although in those cases the aliens had in fact been exempted from service for some period of time. *McGrath* v. *Kristensen*, 340 U.S. 162, 172;[4] *Machado* v. *McGrath*, 193 F. 2d 706, 710 (C.A.D.C.), certiorari denied, 342 U.S. 948; *Mannerfrid* v. *United States*, 200 F. 2d 730, 733 (C.A. 2), certiorari denied, 345 U.S. 918.

Petitioner argues (Pet. 20-24) that Section 3(a) of the Selective Service Act of 1940 must be read in the light of the subsequent provision of Section 315 of the Immigration and Nationality Act of 1952, (*supra*, pp. 3-4) which bars from citizenship an alien who has applied for exemption "*and* is or was relieved or discharged from such training or service on such ground" (emphasis added). That statute has been interpreted to require both application for *and* the obtaining of relief. *United States* v. *Bazan*, 228 F. 2d 455 (C.A. D.C.); see also *Petition of Caputo*, 118 F. Supp. 870 (E.D. N.Y.). The petition argues (Pet. 21-22) that the general reference in the legislative reports of the 1952 Act to this provision as a continuation of the policy established by the disqualification provision of Section 4(a) of the Universal Military Training and Service Act of 1948 (which so far

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[4] In the *Kristensen* case, this Court did hold that the filing of the form by one who was not liable for service at the time was not a bar to citizenship. That ruling has no application here.

as material here is the same as Section 3(a) of the 1940 Selective Service Act) requires that the earlier statute be interpreted in precisely the same manner as the 1952 Act. However, under Section 3(a) of the 1940 Act, relief from service was mandatory upon the filing of a claim for exemption by a neutral alien, and relief from service would ordinarily follow as of course upon the application for exemption (as we think happened here, *supra*, pp. 11-12). There is no indication that Congress, by the conjunctive wording of Section 315 of the 1952 Act, had in mind its possible relation to the extraordinary situation which petitioner claims exists in his case—of a proper claim for exemption which was not acted upon. Moreover, Congress specifically recognized, in the 1952 Act, the existence of Section 3(a) of the 1940 Act when it provided in Section 101(a)(19) of the 1952 Act (*supra*, p. 4) that the term "ineligible for citizenship" is defined to include "an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended * * *." Under these circumstances, there is no reason not to read the words of the 1940 Act, which is phrased differently from the 1952 Act, in accordance with their own plain meaning.

It is clear that Section 3(a) of the 1940 Act, not Section 315 of the 1952 Act, governs petitioner's application for suspension for deportation. In the first place, as noted above, Section

101(a)(19) of the 1952 Act defines as ineligible to citizenship one debarred under Section 3(a) of the 1940 Act. The bar of Section 3(a) continues despite the expiration of the 1940 Act. *Machado v. McGrath*, 193 F. 2d 706 (C.A. D.C.), certiorari denied, 342 U.S. 948; *Ballester Pons* v. *United States*, 220 F. 2d 399, 405 (C.A. 1), certiorari denied, 350 U.S. 830. Moreover, as noted in footnote 2, *supra*, p. 6, petitioner's claim for suspension was made prior to the effective date of the 1952 Act and must be determined under the prior law. Since petitioner did not apply for suspension under the 1952 Act (and did not have the residence requirements to do so), he cannot have his claim to eligibility for citizenship determined by the 1952 Act.

The legal question raised, even on the doubtful assumption that it would be reached in petitioner's case, has no general importance. There can hardly be many cases where a neutral alien who claimed the mandatory right to relief from service is in a position to argue that he was never, even for a short period, granted the claimed exemption. We know of no other cases which present that precise problem. Petitions for naturalization by the few aliens who may be able to claim that, although they asked for exemption, it was not granted will be governed by the provisions of Section 315 of the 1952 Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 71

LUIS ALVARA CEBALLOS (Y ARBOLEDA), PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE AT THE PORT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 92–93) is reported at 229 F. 2d 592. The opinion of the District Court (R. 18–22) is reported at 130 F. Supp. 30.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1956 (R. 94). The petition for a writ of certiorari was filed on April 28, 1956, and was granted on June 11, 1956 (R. 94). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

An alien applied for exemption from military service as a neutral alien in 1943, under a statutory provision and by means of a selective service form both of which specified that such "application" would forever debar him from citizenship in the United States. The alien was not thereafter formally classified by his selective service board, but he was not called by the board until his country ceased to be neutral. The question presented is whether he is debarred from citizenship under Section 3 (a) of the Selective Training and Service Act of 1940.[1]

STATUTES INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940 and the Immigration Acts of 1917 and 1924, together with analogous and further provisions of the Immigration and Nationality Act of 1952, are set forth in Appendix A, *infra*, pp. 48–50.

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals for the Second Circuit (R. 94) affirming the judgment of the District Court for the Southern District of New York (R. 22–23) dismissing his action for a declaratory judgment to declare that he was not barred from United States citizenship and was thus eligible for suspension of deportation, and denying a temporary injunction to restrain the Dis-

[1] The Government, as stated in the Brief in Opposition (pp. 10–11), does not rely upon that aspect of the decision of the Court of Appeals which holds that petitioner omitted a necessary party in failing to make the Attorney General a party to the action. See Point I, *infra*, p. 14.

trict Director of the Immigration Service from taking him into custody for deportation (R. 4–5).

The District Court's dismissal of the complaint was upon the ground that the Attorney General was a necessary party (R. 18–22).[2] The Court of Appeals affirmed upon two grounds. First, the court adhered to the view that the Attorney General was a necessary party where suspension of deportation, rather than a finding of deportability, was involved (R. 92–93). Secondly, and independently, the court held that as a matter of law petitioner was not entitled to the relief he sought since he had made application for relief from military service and was thus debarred from becoming a citizen (R. 93).

With respect to the issue of petitioner's application for relief from military service and consequent debarment from citizenship, the following facts, appearing in the administrative record, are undisputed. Petitioner, a citizen of Colombia, was admitted to the United States for permanent residence in February 1942 (R. 34, 56). He was employed as export clerk for Smith Kirkpatrick, New York City, and as a translator for Union Carbide & Carbon Corporation (R. 34–35).

He registered under the Selective Training and Service Act in May 1942 (R. 56). On June 16, 1943, being then 30 years of age (R. 7, 12), he executed Form DSS 304, "Alien's Personal History and Statement", filling in the word "do" in the statement, "I

[2] The opinion of the District Court was handed down on April 15, 1955, while *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, was pending in this Court.

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do object to service in the land and naval forces of the United States" (R. 35). The form contained the following notice:

> * * * If you are a citizen or subject of a neutral country and you do not wish to serve in the land or naval forces of the United States, you may apply to your Local Board for an application by alien for relief from military service (Form 301) which, when executed by you and filed with the Local Board, will relieve you from the obligation to serve in the land and naval forces in the United States, but will also debar you from thereafter becoming a citizen of the United States [7 F. R. 3424].

On August 26, 1943, petitioner executed Form DSS 301 (R. 35). This form bears the heading in large letters "Application by Alien for Relief from Military Service" (R. 65), and contains the following paragraph (R. 80).

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. I have not filed a declaration of intention to become a citizen of the United States.*

* Petitioner makes no claim, either in his petition or his brief, that he misunderstood the forms, but in his statement of facts in the petition (Pet. 7–8) he makes two statements, which are eliminated in his brief (Pet. Br. 5–6), implying that he discussed the forms with the selective service board and supposed that the

Subsequent to petitioner's execution of Form 304, on June 16, 1943, stating "I do object to service in the land and naval forces", the selective service board apparently took no action to induct petitioner or to exempt him formally from induction until January 1944, after Colombia ceased to be a neutral nation and petitioner's status as a neutral alien had accordingly ended. Colombia declared war on November 26, 1943 (R. 49, 80), and notice thereof was issued to local boards by the Selective Service System on December 20, 1943 (Amendment of Local Board Memorandum No. 112). Petitioner thereupon was classified I–A (R. 32, 61). However, upon physical examination, petitioner was not accepted, and he was never inducted into the armed forces (R. 33, 61).

Some six years later, apparently in 1950, petitioner became a citizen of Mexico (R. 78–79). On January 3, 1951, he married a United States citizen (R. 37, 74). On April 2, 1951, he entered the United States by plane at New York, stating his purpose as transit to Mexico (R. 26–28). He did not continue to Mexico and he did not apply for an extension of the temporary admission (R. 28); he was thereupon arrested as being in the United States in violation of the immigration laws (R. 26–27).

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forms were a mere means to assignment in some hypothetical Colombian contingent of the United States Army. The suggestion was fully explored at the hearings and by the Board of Immigration Appeals and found untrue. The facts and findings on this point are summarized in Appendix B, *infra*, pp. 51–53.

At the deportation hearing on July 31, 1951, petitioner asked for the discretionary relief of suspension of deportation under the Immigration Act of 1917, then in effect (R. 3, 42, 70). Petitioner's wife, who had accompanied him on the plane, testified that at the time she came to the United States she was pregnant and not feeling well (R. 39). She and petitioner decided to stay in the United States because she would thus be with her family (R. 39), would receive better medical care than in Mexico (R. 39), and because the child would then be a citizen of the United States (R. 40). Petitioner testified that his reasons for not going on to Mexico were "the way my wife feels about remaining here in the United States and * * * I would very much like to remain here; my business is here, my wife is from this country, and my relatives—my other brothers—are moving to this country" (R. 44). Petitioner asserted that he had not had an intention to remain here when he emplaned for the United States (R. 44).

The special inquiry officer, both after the initial hearing (R. 70–72) and after the reopened hearing (R. 74–77), found petitioner ineligible for suspension of deportation because ineligible for citizenship as a result of the application for relief from military service.[4] The special inquiry officer granted peti-

[4] The officer found that petitioner's deportation would meet the criterion of "serious economic detriment" to his wife and two children, all born in the United States (R. 74), which criterion, rather than "exceptional and extremely unusual hardship" (the present standard), was the standard under the 1917 enactment. The 1917 law governed petitioner's application for suspension of deportation by reason of Section 405 (a), the savings clause of

tioner the privilege of voluntary departure, but petitioner continued to live in the United States (R. 12, 77).

On appeal, the Board of Immigration Appeals concluded (R. 86–87, 89):

> [T]here is no competent evidence to establish that [petitioner] was not reclassified in accordance with Selective Service regulations applicable to his case. * * *. The fact that he was called for induction so quickly after Colombia became a belligerent and was not troubled from August 26, 1943, the date he signed the Form DSS 301, for the entire period that Colombia remained a neutral is some evidence that he received the exemption he applied for. In any event, it is our belief that the act of filing the Form DSS 301 * * * created the bar to naturalization. The clear language of the statute, requires this conclusion. * * *. The statute does not require that any act follow the filing of the application to make the neutral alien exempt and the regulations to implement the law do not so provide (32 CFR 622.43, 1943 Supp.).
>
> * * * * *
>
> [W]hether or not the alien was reclassified, it is clear that after he had filed his application, he could not have been legally inducted while Columbia remained a neutral (32 CFR 622.43 (b), *supra*).

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the Immigration and Nationality Act of 1952 (*infra*, App. A. p. 50). Petitioner was then in no position to file a new application for suspension under the 1952 Act, as he did not meet the minimum residence requirements. See *infra*, pp. 46–47.

Upon the final reconsideration by the Board of Immigration Appeals of its adverse ruling on February 17, 1955, petitioner commenced the instant action in the District Court to require him to be declared eligible for suspension of deportation.

SUMMARY OF ARGUMENT

I

The government, as already stated in its brief in opposition to certiorari (p. 10), does not rely upon that aspect of the decision of the Court of Appeals which holds that the Attorney General is a necessary party. Despite the distinction that suspension of deportation, rather than deportation itself, is involved here, the general considerations enunciated by this Court in *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, 52–54, appear to be controlling. This will be the position of the government in future cases.

II

The Court of Appeals affirmed the dismissal of petitioner's complaint upon the merits as well as on the indispensable-party issue. While the court properly rested its substantive holding on the ground that the statute (Section 3 (a) of the Selective Training and Service Act, App. A, *infra,* p. 48) imposed debarment from citizenship upon the act of the alien in making application for exemption, regardless of whether the alien actually received relief from service, we suggest, first, that this issue need not be reached since petitioner did actually obtain exemption.

A. Section 3 (a) of the 1940 Selective Service Act provides that a neutral alien "shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application" in accordance with the regulations. This language embodies no requirement that there be some additional administrative action for the claimed exemption to go into effect. The self-executing nature of the grant of exemption, once a proper application is made, is confirmed by the language of the Congressional reports and the regulations, as well as by the basic purpose of affording recognition to the objections of other nations to the drafting of their subjects—a recognition that would be incomplete if the grant of exemption, as distinguished from the evidencing of the grant, were left to the vagaries of administrative discretion or tardiness. In the language of S. Rep. No. 915, 77th Cong., 1st Sess., p. 2, petitioner was relieved by the statute of liability for military service "upon making application."

B. In any event, petitioner received actual exemption from his board. Before he filed his Form 301 in August 1943, he had been subjected to the usual requirements imposed upon one considered liable to service. After his filing of Form 301, however, the board at no time disturbed him further until he ceased to be a neutral alien. The freedom from call after he filed his Form 301 and the prompt call for induction in January 1944, after he ceased to be a neutral alien, cannot reasonably be attributed, in light of the war-time manpower needs

of 1943, to anything but the recognition that he was exempt.

This relief from service was in no sense nullified by the selective service board's failure to evidence it by a formal IV-C classification. If petitioner had at any time felt dubious about his status, he could have called for his classification and notice card. Conversely, if the board had overlooked the exemption and called petitioner for service, the Form 301 would have constituted a complete bar to induction.

C. The fact that petitioner's status changed when his country, Colombia, ceased to be a neutral does not negate the fact of exemption. Petitioner knowingly made a choice of exemption from service as against the future possibility of citizenship. It is that fact of choice which Congress has made the basis of ineligibility to citizenship.

III

If, however, it be assumed that petitioner was not in fact exempted, his case must nevertheless fail, for the pertinent provision of Section 3 (a) of the 1940 Selective Service Act, imposes debarment from citizenship upon any person "who makes such *application*" (emphasis added). Petitioner indisputably was such a person.

A. All of the pertinent factors show that, at the time of its enactment, Section 3 (a) made the *application* decisive. The statute makes no exception for the person who fails to receive all or as much as he expected. His recourse is against the administrative authorities if they seek to deprive him of his exemption, but the stamp remains upon him as one

who, in a critical time, chose not to serve the United States and whose undesirability as a citizen of the United States has accordingly been determined by the Congress.

1. As drafted and here applicable, Section 3 (a) attached to the act of applying for exemption two separate consequences, neither of which was conditioned upon the other: exemption from service and debarment from citizenship. That is the precise way the statute reads. And while it was not envisaged by the legislators, in light of the mandatory nature of the statute, that either exemption or debarment would or could fail to occur, there is also legislative history indicating that debarment from citizenship was to be an inevitable and unconditional consequence of a choice by an alien to reject military service.

2. The basic rationale of the statute is a Congressional judgment of the undesirability as a citizen of one who would deliberately choose not to serve in wartime. Section 3 (a) is a recognition by the United States of the general privilege of certain aliens to exemption from military service—a consistent counterpart of the vigorous historical insistence by the United States upon freedom of its own citizens from service in foreign armies. But if the provision for debarment were a mere device for pressuring aliens into service and thus a species of punishment, not to be inflicted if the objective of obtaining military service from the alien was achieved, such pressure would run counter—clearly though indirectly—to the recognition of the alien's rights which was basic to Section 3 (a). The determination of who would be

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a desirable citizen is, however, a wholly domestic issue. And Congress required that determination to be made on the basis of the alien's choice—his application for exemption.

3. The intent to make the application the decisive factor is confirmed by the language of the Congressional reports at the time of the enactment of Section 3 (a), all of which talk in terms of the request for relief as the operative element.

4. Judicial holdings on the point are rare since the factual situation of applications-not-followed-by-exemption has seldom arisen. But where this Court and other courts have tangentially interpreted the language of Section 3 (a) in incidentally paraphrasing it, they too have spoken in terms of the application for relief as the effective factor. *E. g., McGrath* v. *Kristensen,* 340 U. S. 162, 172.

5. The contemporary administrative construction, by the selective service regulations, reflects the same view. Those regulations do not make debarment dependent on administrative or board action upon the application, or on a grant of the exemption.

B. The historical development of this type of legislation, before and after the enactment of Section 3 (a), confirms the validity of interpreting it in accordance with its literal language as making the application for relief the decisive factor in determining eligibility for citizenship.

The early history shows the emergence of the rationale that one who would not choose to serve is not a desirable citizen. It also shows that when Con-

gress chooses to engraft exceptions, as it did in 1931, it uses apt language for the purpose.

Petitioner contends that Section 315 (App. A, *infra*, pp. 49–50) of the 1952 Immigration and Nationality Act (enacted *after* petitioner's request for suspension of deportation) was intended to express the effect of Section 3 (a) of the 1940 Act, and, thus, that the specific requirement of Section 315 (a) that the alien also receive the exemption, if he is to be barred from citizenship, is by implication an additional requirement of Section 3 (a). Our analysis of the 1950–1952 course of this legislation indicates, however, that the committee expressions relied upon by petitioner were applicable only to the earliest draft of the 1952 Act which did not, as did the final statute, specifically refer to Section 3 (a) of the 1940 Act. Section 315, as finally enacted, was (in the aspects pertinent to this case) only a supplement to Section 101 (a) (19) (App. A, *infra*, p. 49), which specifically attested the continued effect of Section 3 (a) of the 1940 Act (as originally enacted) as a ground for ineligibility to citizenship. Moreover, even Section 315, insofar as it may link the grant of the exemption to the application, would not require any evidence of grant of the exemption beyond the factual posture of the instant case (see Point II, *supra*).

IV

The discussion of what light the 1952 legislation may afford with respect to Section 3 (a) of the 1940 Act must not, in any event, obscure the fact that the

1952 provisions, in themselves, are not operative in petitioner's case. Both his application for exemption and his later application for suspension of deportation were made before the enactment of the 1952 Act. Under the pre-1952 law, he was able to avail himself of the markedly easier requirements concerning the showing of hardship in case of deportation. His application for suspension of deportation cannot now be sustained upon this earlier, less stringent, basis with respect to showing of hardship, while judging the requirement of eligibility for citizenship upon a basis not even enacted at the time of his application.

ARGUMENT

I. THE GOVERNMENT DOES NOT RELY UPON THE HOLDING OF THE COURT OF APPEALS THAT THE ATTORNEY GENERAL IS A NECESSARY PARTY

The government has already advised this Court (Br. Opp. 10) that it does not rely upon that aspect of the decision of the Court of Appeals which holds that the Attorney General is a necessary party. Petitioner seeks a declaration that he is not barred from citizenship and is thus not statutorily ineligible for suspension of deportation (R. 5–6), and an injunction against his deportation (R. 6). As we read this Court's decision in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 52–54, the question of indispensability of parties does not turn upon the authority of the party before the court to effectuate the ultimate relief which the alien desires but upon his authority to effectuate the specific relief sought in the action. Thus, the Court observed (349 U. S. at 52–54):

> * * * District Directors are authorized by regulation to issue warrants of deportation, * * *. The regulations purport to make these decisions of the District Director final. It seems highly appropriate, therefore, that the District Director charged with enforcement of a deportation order should represent the Government's interest. Otherwise in order to try his case an alien might be compelled to go to the District of Columbia to obtain jurisdiction over the Commissioner. To impose this burden on an alien about to be deported would be completely inconsistent with the basic policy of the Administrative Procedure Act to facilitate court review of such administrative action. We know of no necessity for such a harsh rule. Undoubtedly the Government's defense can be adequately presented by the District Director who is under the supervision of the Commissioner.
>
> It is argued, however, that the Commissioner should be an indispensable party because a judgment against a District Director alone would not be final and binding in other immigration districts. But we need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by the immigration authorities. * * * Our former cases have established a policy under which indispensability of parties is determined on practical considerations. * * *

Here, the essence of what petitioner asks is the recall of the order of deportation and the enjoining of the District Director from taking petitioner into custody for deportation. Since the District Director is the

person who would execute the deportations, we think that the Court's decision in *Shaughnessy* v. *Pedreiro, supra,* establishes the District Director as a sufficient party. As noted in the brief in opposition, this will be the position of the government in future cases.

II. SINCE PETITIONER WAS IN FACT RELIEVED FROM SERVICE AS A NEUTRAL ALIEN, HE IS INELIGIBLE FOR CITIZENSHIP AND THEREBY IS ALSO INELIGIBLE FOR SUSPENSION OF DEPORTATION UNDER THE IMMIGRATION ACT OF 1917 (AS AMENDED)

The Court of Appeals also affirmed the dismissal of petitioner's complaint, irrespective of the question of indispensable parties, upon the broader ground that the complaint failed to state a proper claim. The court deemed it unnecessary to inquire whether the selective service board's failure to call petitioner for induction was due to petitioner's request for exemption as an alien, since he was within the bar of the statute as an alien who "has made application" to be relieved from military service (R. 93). While the decision may be sustained upon that ground (discussed *infra,* pp. 23–46), it is the government's position that before that issue is reached a further ground is dispositive of the case, *i. e.,* that petitioner was in fact relieved from military service. He was relieved from service both (1) by the pertinent enactment which—self-executing and without further requirement of any kind—provided that a neutral alien should be relieved if he "made application", and (2) as a matter of record, by the action of the selective service board in refraining from calling him for induction during the time following his application

until he ceased to be a neutral alien and the basis for exemption was thus eliminated. That the basis for exemption subsequently ceased to exist does not negate the crucial fact that for over a quarter of a year petitioner obtained the exemption which he knowingly chose in preference to citizenship.

A. *The Selective Training and Service Act of 1940 and the regulations relieved petitioner from service, irrespective of further administrative action.*

Petitioner was relieved from military service by the self-executing terms of the Selective Training and Service Act, and without need of any further action by a board. The law in effect in 1943 (Selective Training and Service Act of 1940, Section 3 (a), *infra*, App. A, p. 48) provided:

> That any citizen or subject of a neutral country *shall be relieved* from liability for training and service under this Act, *if*, prior to his induction into the land or naval forces, *he has made application* to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President * * *. [Emphasis added.]

While the statutory provision relating to the application specifically requires that the *application* be made "in accordance with rules and regulations", the provision granting relief from military service is, in contrast, subject to no such condition. Upon the making of a proper application, the relief becomes effective under the Act; no rules or regulations can prevent, and no further steps are necessary to, the effectiveness of the application to relieve the applicant from service.

The statute's distinction, between the making of the application and its consequences, with respect to rules and regulations has a sound basis. Administrative need justifies the requirement of an orderly presentation of a neutral alien's case to the authorities, but no delay by those authorities should, in this type of exemption, permit delay in the vesting of the exemption written into the law itself. Whatever tangible recognition of the neutral's right might later be issued by the administrative authorities in the form of a classification of IV–C or otherwise, the right to the exemption would accrue with the application (which was in proper form).[5]

The automatic character of the exemption seems to have been assumed in the selective service regulations in effect in 1943. These provided that when a neutral alien filed his application (Form 301) he should not only be placed in Class IV–C but also, in language similar to the Act itself (7 F. R. 2087):

> shall be relieved from liability for training and service * * *

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[5] During the progress, in December 1941, of the proposed legislation which produced Section 3 (a), the congressional reports used language consistent with a self-executed exemption:

> In the case of citizens or subjects of any neutral country, special provision is made to enable them, *upon application*, to be relieved from the liability for service * * *. [H. Rept. No. 1508, 77th Cong., 1st Sess., p. 4. Emphasis added.]
>
> * * * * * *
>
> * * * [A]liens who are citizens or subjects of a neutral country would be relieved of liability *upon making application* in the manner prescribed by the President * * *. [S. Rep. No. 915, 77th Cong., 1st Sess., p. 2. Emphasis added.]

The regulations thus appear to treat the relief from liability to service as something in addition to and independent of the IV–C classification. The IV–C classification was to be issued, but the relief from liability was not to be prevented or rendered ineffective by any delay or negligence of a selective service board under the pressure of classification activities. Had the board attempted to call petitioner for induction during the time he remained a neutral alien, he would have needed to adduce only the fact of his making of the application to render the board powerless to deprive him of his exemption—regardless of any delay in the making of the formal IV–C classification.

This express effect of the statutory language is consistent with the general purpose of Section 3 (a). The United States, which has long insisted upon the freedom of its citizens from conscription by other nations, has, in its own conscription enactments, consistently accorded some recognition to a similar claim by citizens of other nations. See *infra,* pp. 26, 32 *ff.* It is entirely consistent with this position that the relief of a neutral alien from military service be recognized as soon as it is properly asserted, without conditioning the exemption on administrative discretion or administrative power to negate the statutory grant of exemption by non-action.[6]

[6] The foregoing considerations were overlooked in one of the holdings in *United States* v. *Bazan*, 228 F. 2d 455 (C. A. D. C.), where the Court of Appeals based its decision under Section 315 of the Immigration and Nationality Act of 1952 (App. A, *infra*, pp. 49–50) on the absence of proof of the administrative granting of the exemption. The government considered the situation too

B. *The selective service board, by its conduct in refraining from inducting petitioner, recognized petitioner's relief from liability for military service.*

In the face of the enactment and regulations, the selective service board, as we have just pointed out, would have been powerless to deny petitioner relief from military service or to act inconsistently with his existing exemption. Actually, the board disclosed by its conduct that it recognized the exemption effected by petitioner's filing of Form 301. The board may have been remiss in failing to evidence the exemption by going through the formal procedure of a IV–C classification and notice to petitioner, as provided in the regulations. But while the record is silent as to what problems of staffing and administration may have caused the delay during that wartime summer and autumn of 1943, the record does indicate the board's recognition of the exemption. Petitioner was not troubled from the time he filed Form 301 until his right to the exemption ceased with the cessation of his status as a neutral alien. This would not appear to have been inadvertent. Before August 26, 1943, when he made application for relief, he had had the ample attention of the board with respect to the requirement that various forms be completed. Conversely, after the board was advised, by the Local Board Memorandum amendment issued on December 20, 1943 (No. 112), that Colombians were no longer neutral aliens, petitioner received the prompt attention of the board within the following month and was classified I–A. In

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rare and special to warrant a petition for certiorari. See *infra*, p. 29.

the light of the critical state of the war in 1943 and the drastic demand for military manpower at that time, it seems evident that petitioner was in fact relieved from service for at least four months, despite some possible delay in the mechanics of formal classification and notice.

C. *The fact that petitioner's status subsequently changed does not negate the fact that he did obtain exemption.*

Petitioner, in both his petition and brief in this Court, obscures the issue as to the fact of exemption by disregarding the change in petitioner's status resulting from Colombia's entrance into the war.

After stating that the selective service board failed to make a formal classification of IV-C, petitioner continues: "On the contrary, in January 1944, the petitioner received notice from his Board that he had been classified I-A * * * and he promptly and willingly appeared" (Pet. Br. 6, 14; Pet. 8, 24). What is omitted is the fact that petitioner ceased to be a neutral alien on November 26, 1943, when Colombia declared war and became a co-belligerent. The whole impact of petitioner's recital is thus that the selective service board, by classifying petitioner I-A, denied petitioner's exemption as a neutral alien, whereas the fact is that petitioner was not classified I-A in an attempt to deny his neutral exemption. Rather, after a period of more than a quarter of a year, during which the exemption was recognized, he ceased to be a neutral alien—a fact which was exhaustively litigated below by petitioner, and conclusively found against him in

a special opinion of the Board of Immigration Appeals establishing the date of Colombia's entrance into the war (R: 89–91). The record is indisputable: at no time after petitioner filed his application did the board call upon him or in any way deny him his relief from military service as a neutral alien, so long as he remained such an alien.

There need only be added the observation, overlooked in a portion of petitioner's argument, that the fact that petitioner was actually relieved under an exemption is not in any sense negated by the further fact that the exemption, like virtually every exemption under the Act, ceased upon the cessation of the factual basis for the exemption. If one who is exempted as a minister of religion should leave his calling, his exemption would terminate, but he could not claim that he had not received an exemption during the time that he was freed from service.

Similarly, petitioner cannot be heard to complain that he did not get enough advantage out of his application to warrant the permanent consequence imposed upon it by Congress. Congress did not say, as it could have, that only a certain period of freedom from service should be paid for by debarment from citizenship, and not any lesser time; it debarred all aliens who claimed exemption as neutrals. Even a small period of freedom from service—to say nothing of petitioner's three or four months—might mean another person's earlier entrance into service in the beneficiary's place at an extremely critical period of the war. Petitioner intelligently and knowingly chose respite from service as against future citizenship. That the respite was not as long as he may have hoped

does not change the fact of choice. *Machado* v. *McGrath*, 193 F. 2d 706, 709 (C. A. D. C.), certiorari denied, 342 U. S. 948; *Ballester Pons* v. *United States*, 220 F. 2d 399, 403–404 (C. A. 1), certiorari denied, 350 U. S. 830; *Petition of Cuozzo*, 235 F. 2d 184, 185 (C. A. 3); *In re Martinez*, 73 F. Supp. 101, 109 (W. D. Pa.); *Petition of Dweck*, 106 F. Supp. 169 (E. D. N. Y.); *In re Molo*, 107 F. Supp. 137, 140 (S. D. N. Y.); *Petition of Velasquez*, 139 F. Supp. 790, 793 (S. D. N. Y.). As the court said in *Petition of Fatoullah*, 76 F. Supp. 499 (E. D. N. Y.), "it is not seen how this Court can amend [the words of Section 3 (a)] by inserting or adding a provision to the effect that, where there are extenuating circumstances [later co-belligerence of alien's country, as in Ceballos' case], the Naturalization Court may ignore the plain provisions of the law."

III. DEBARMENT FROM CITIZENSHIP UNDER SECTION 3 (A) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, RESULTS FROM THE MAKING OF AN APPLICATION FOR RELIEF FROM MILITARY SERVICE BY THE ALIEN

It is the position of the government that, even if it be assumed (contrary to our argument in Point II) that petitioner was not relieved at all from military service, he was nevertheless debarred from citizenship by his act of making application for relief from service. The act of application has been made the decisive factor by Congress. Viewed as of the time of the enactment of Section 3 (a), the pertinent considerations support that view, and despite petitioner's reliance upon prior and subsequent history, the history

does not detract from, but rather strengthens, the interpretation of the statute we support, which is also the construction adopted by the court below (R. 93).

A. *The language, purpose, legislative history, judicial, and administrative construction of Section 3 (a) show that the application for exemption is the debarring act.*

1. *The language.*—Section 3 (a) of the Selective Training and Service Act of 1940, as amended immediately after the attack on Pearl Harbor in December 1941, provided (App. A, *infra*, p. 48).

> * * * [A]ny citizen or subject of a neutral country shall be relieved from liability for training and service under this Act *if* * * * *he has made application to be relieved from such liability* in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but *any person who makes such application shall thereafter be debarred* from becoming a citizen of the United States. * * * [Emphasis added.]

Two consequences of the making of the claim were thus set forth:—(1) relief from liability and (2) debarment from citizenship. Neither of these consequences was made conditional upon the other, or made the source of the other. If, for example, eligibility for citizenship had been restored in some other enactment, the liability to military service, in the absence of a specific new provision, would not then have been imposed upon the alien, so long as he had met the condition in Section 3 (a) of an application for exemption. Conversely, under the language of the section, the parallel consequence of debarment from

citizenship stems from the claim and not from the exemption, which is a consequence of the claim.

2. *The purpose.*—This interpretation accords with the basic rationale of the statute. The impetus for the legislation (as shown by the historical development discussed, *infra,* pp. 25–28, 32 *ff*) is the recognition by the United States and, indeed, the insistence by the United States, that certain citizens of one nation could not be conscripted by another nation. There was need, however, to accommodate this aspect with the troublesome consideration that aliens within the United States could thus enjoy substantial benefits and prolonged residence within its protected borders without choosing to contribute their services to the country of their residence. The appropriate accommodation which Congress developed was to recognize the implications of the alien's choice of exemption in its bearing upon any later protestations he might make concerning his devotion to the United States in a period when citizenship would be more attractive. The basic theory of the legislation is the Congressional judgment that a resident alien who would deliberately choose not to serve the United States in wartime—knowing that such a choice meant debarment from future citizenship—would not make a good citizen and should not be allowed that privilege. It is therefore immaterial whether or not the alien obtained the chosen benefit; it is the fact of choice in the time of critical decision which determines his desirability as a citizen.

3. *The contemporary legislative history.*—The 1940 selective service legislation, as originally enacted on

September 16, 1940, embodied no provision for exemption of aliens; it made liable to service male aliens of the specified ages residing in the United States who had declared their intention to become citizens (54 Stat. 885–886, Section 3 (a)). However, there had already been rumblings of objection. The War Department, aware of the potential problem with countries whose nationals would be drafted, suggested at the hearings of July 3, 1940, that provision be made, similar to the 1918 provision (discussed *infra,* pp. 34–36), that a declarant alien may be exempted—

> upon his making declaration withdrawing his intention to become a citizen of the United States, *which withdrawal shall operate and be held to cancel his declaration of intention* from becoming a citizen of the United States, *and he shall forever be debarred* from becoming a citizen of the United States * * *. [Hearings before the Sen. Committee on Military Affairs on S. 4164, 76th Cong., 3d Sess., July 3, 5, 10–12, 1940, p. 357. Emphasis added.]

This suggestion was not adopted, but in April 1941, still 7 months before the attack on Pearl Harbor, the Secretary of State suggested a similar provision, which was passed by the Senate, but not by the House (S. 1397, 77th Cong., 1st Sess.; 87 Cong. Rec. 5726). This later provision stressed the alien's act as the causative factor, supplanting the phrase "*and* he shall forever be debarred" (emphasis added) with the language that a declarant alien "shall be relieved from liability" to service if he made a statement of withdrawal of intention "*which shall be held* to cancel his declaration of intention to become a citi-

zen of the United States *and to forever bar him from becoming such a citizen"* (emphasis added).[7]

Within two days after the attack on Pearl Harbor, hearings were commenced for extending conscription. In the proposal submitted at the outset of the hearings, there reappeared what was substantially an adaptation of the 1918 language (*infra,* p. 36), as follows (Hearings before the House Committee on Military Affairs, on H. R. 6215, 77th Cong., 1st Sess., Dec. 13, 1941, pp. 1–2):

> [A]ny citizen or subject of a neutral country shall be relieved from liability for training and service under this Act by making application * * * to be relieved from liability for training and service under this Act, and *such person* shall thereafter forever be debarred from becoming a citizen of the United States * * *. [Emphasis added.]

This language could conceivably relate "such person" to one who was *"relieved* * * * by making appli-

[7] The text, appearing at 87 Cong. Rec. 5726, was as follows:

> "*Provided further*, That any male alien residing in the United States who has declared his intention to become a citizen of the United States who is registered or who is or may become liable to registration under the provisions of this act shall be relieved from liability to training and service thereunder if he makes a declaration prior to becoming a member of the land or naval forces or within a time fixed by the President if he is already a member of the land or naval forces, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States which shall be held to cancel his declaration of intention to become a citizen of the United States and to forever bar him from becoming such a citizen."

cation". The later change is accordingly significant in providing, in the bill as submitted by the Committee to the House on December 15, the phrase "any person *who makes such application* shall thereafter be debarred * * *" (H. Rep. No. 1508, 77th Cong., 1st Sess., p. 6; emphasis added.)[8]

In the draft submitted at the outset of the Senate committee hearings on December 15, 1941 (Hearings before the Sen. Committee on Military Affairs, 77th Cong., 1st Sess., on S. 2126, Dec. 15 and 16, 1941, p. 1) the changed language already appeared, barring "any person who makes such application."[9] In both the House and Senate reports the debarment was specifically stated to result from "the making of such application".[10]

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[8] We find no discussion of the change in the hearings themselves. In the hearings held by the Senate committee (Hearings before the Sen. Committee on Military Affairs, 77th Cong., 1st Sess., on S. 2126, p. 51) Captain Keesling reported, concerning provisions on aliens but not clearly or specifically as to the instant provision, "The House has changed its bill completely. The House bill now is almost identical with your bill": And see *ibid.*, p. 46.

[9] This provision was not discussed in the section-by-section discussion. *Id.*, p. 58.

[10] "* * * In the case of citizens or subjects of any neutral country, special provision is made to enable them, upon application, to be relieved from the liability for service, but *the making of such application* will debar them from becoming citizens of the United States * * *. (H. Rept. No. 1508, 77th Cong., 1st Sess., p. 4. Emphasis added.)

"* * * Under the bill reported by the committee, aliens would be liable whether or not they had declared their intention to become citizens. However, aliens who are citizens or subjects of a neutral country would be relieved of liability upon making application in the manner prescribed by the President, but *the*

4. *Judicial opinions.*—There are very few judicial decisions on the issue because the factual situation almost never arises. As pointed out *supra,* pp. 17–20, it is almost a paradox to say that an alien has not been afforded relief from military service when the legislation itself makes that relief mandatory and immediately effective. Only where a rare administrative accident, such as a failure to go through the mechanics of classification, obscures the actual grant of relief (as in this case), or where the issue is raised on pleadings which leave the question of actual relief open, as in *Rasmussen* v. *Brownell,* now pending on petition for a writ of certiorari No. 399, this Term, has the point arisen.[11]

However, it is significant that, in dealing with other issues under the statute, the courts, although not called upon to decide the direct issue, have spoken of the debarment in terms of the application or claim, and not of the actual relief accorded. Thus, this Court said in *McGrath* v. *Kristensen,* 340 U. S. 162, 172:

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making of such application will debar them from ever becoming citizens of the United States * * *." (S. Rept. No. 915, 77th Cong., 1st Sess., p. 2. Emphasis added.)

On the floor of the Senate, Chairman Reynolds employed the identical language of the last sentence of the above Senate report (87 Cong. Rec. 9905).

[11] As noted *supra,* fn. 6, p. 19, in *United States* v. *Bazan,* 228 F. 2d 455 (C. A. D. C.), involving a construction of Section 315 of the Immigration and Nationality Act of 1952 (see *infra,* pp. 49–50), the fact of relief from service had not been litigated before the District Court and the Court of Appeals based its decision on the absence of proof. *Petition of Caputo,* 118 F. Supp. 870 (E. D. N. Y.), also interpreting Section 315, involved an enemy alien not covered by Section 3 (a) of the 1940 Selective Service Act.

> By the terms of the statute, that bar only comes into existence when an alien resident liable for service *asks* to be relieved. [Emphasis added.]

And in *Moser* v. *United States,* 341 U. S. 41, 45, the Court stated that Section 3 (a) "imposed the condition that neutral aliens residing here who *claimed* such immunity would be debarred from citizenship" (emphasis added). See also, *Machado* v. *McGrath,* 193 F. 2d 706, 710 (C. A., D. C.), certiorari denied, 342 U. S. 948: "any person who *asks* for this relief is thereafter debarred" (emphasis added); *Mannerfrid* v. *United States,* 200 F. 2d 730, 731 (C. A. 2), certiorari denied, 345 U. S. 918: "he would be debarred from ever becoming a citizen, if he ever *claimed* exemption from military service as he did", and "the forfeiture * * * that the Act imposes upon a *claim* for exemption" (emphasis added); *Navarro* v. *Landon,* 108 F. Supp. 922, 925 (S. D. Cal.): "his *application* created the bar" (emphasis added).

5. *The contemporary administrative construction.*— The contemporary administrative construction was also in accord with the literal language of the statute. The regulations of the Selective Service System provided that when an alien filed an application for exemption he should be placed in Class IV-C, but also stated, in independent phrases not conditional upon the IV-C classification, that upon such filing the alien should be relieved from liability and be debarred from becoming a citizen.[12] See *supra,* pp. 18–19. Simi-

[12] Section 622.43 * * * (b) When an alien registrant who is a citizen or subject of a neutral country * * * files [Form 301] * * * he shall be placed in Class IV-C; shall be relieved from liability for training and service * * *; and shall thereafter be debarred

larly, Sections 623.1 and 623.61 of these regulations provided generally for prompt classification and mailing of notice thereof, without any attempt to provide that fulfillment of these responsibilities of the selective service board was a prerequisite to the operation of the provision of the statute making the application a permanent debarment from citizenship. Indeed, in 1943, probably because of the controversies concerning alien treaty exemptions between the United States and various countries, Section 622.43 was revised to delete the language incorporating the statutory provisions concerning relief from liability and concerning debarment, and to deal only with the Selective Service System's function of providing a IV-C classification.[13]

The official forms, signed by the alien, were harmonious with the contemporary interpretation. Form 304 explicitly warned the alien that his application for relief "will also debar you from thereafter becoming a citizen" (*supra*, p. 4), and Form 301 stated "I understand that *the making of this application * * * will debar me*" (*supra*, p. 4; emphasis added).

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from becoming a citizen of the United States." (7 F. R. 2087, effective Mar. 16, 1942.)

It is noteworthy that the word "thereafter," by reason of the complete separation of the phrases by semi-colons, relates only to the time of the alien's filing of his application and not to the IV-C classification or relief from liability.

[13] Section 622.43, as revised: "(a) In Class IV-C shall be placed any registrant: * * * (2) Who is an alien and who is a citizen or subject of a neutral country * * * and who * * * files with his local board an Application by Alien for Relief from Military Service (Form 301) * * *." (32 C. F. R. [1938 ed., 1943 Supp.] 622.43; 8 F. R. 13672, effective Oct. 1, 1943.)

In short, all the pertinent factors bearing directly on the 1940–1941 legislation here involved support the unconditional nature and operation of the statutory language that "any person *who makes such application* shall thereafter be debarred" (emphasis added).

B. *The historical development of this type of legislation shows that the bar to citizenship stems from the claim to exemption.*

As against the explicit wording and contemporary history of the 1940 Act (as amended), petitioner adduces only certain utterances in opinions involving other enactments (discussed, *infra*, p. 36, fn. 17), the random phrasing of a very general congressional report written long after, in 1950 (discussed in its chronological position *infra*, pp. 40–43), and the asserted effect of a provision of the 1952 immigration legislation (discussed, *infra*, p. 40 *ff*). Viewed in historical context, none of these factors detracts from the force of the more pertinent considerations discussed above, which support our interpretation of Section 3 (a) in accord with its literal terms.

1. *The period prior to 1940.*—The early development of the debarment from citizenship of aliens claiming exemption from military service discloses that its fundamental rationale, as already noted (*supra*, pp. 19, 25), is a Congressional judgment as to their undesirability as citizens.

While there was early recognition and, indeed, insistence that certain aliens could not properly be sub-

ject to military service,[14] during the Civil War, in light of the privileges then enjoyed by some aliens in the United States including even the right to vote, there were countervailing arguments for military service by aliens. Legislation requiring such service, passed in 1862, was applied to declarant aliens and aliens who had voted, and, later, to all aliens.[15] In the course of debate on that legislation, Senator Doolittle argued that an alien who had resided in the United States and had pleaded exemption as an alien, "is not proving that he is a good citizen and attached to the Constitution." 62 Cong. Globe 993. And Senator Cowan urged the drafting of aliens as "the very best mode of testing them" (see 62 Cong. Globe 1001).[16]

The conscription law of 1898 (30 Stat. 361) and the first 1917 law (40 Stat. 76, 78) again made declarant

[14] See the observations of President Madison in 1804 and of Secretary of State Seward on the eve of the Civil War, in 1862 (4 Moore, *Digest of International Law* 52–53; 62 Cong. Globe 991). Cf. Secretary of State Fish in 1869 and an assistant (Moore, *op. cit.* 57–59) with Secretaries of State Bayard and Blaine (4 Moore, *op. cit.* 54, 60). And see Moore, *op. cit.* 58; 3 Hackworth, *Digest of International Law*, 599).

[15] Act of July 17, 1862, c. 201, 12 Stat. 597; Act of March 3, 1863, 12 Stat. 731; see 62 Cong. Globe 991–993, 997–1002, 1217; 4 Moore, *op. cit.* 53–54.

[16] The actual treatment of aliens during the Civil War did not follow a clear pattern, for while the President proclaimed that no declarant alien who had voted or who was found in the United States within 65 days would be exempted (13 Stat. 732), it later appeared, in the words of Secretary of State Bayard, that "there [was] not a single instance in which an alien was held to military duty when his Government called for his release" (4 Moore, *op. cit.* 54–56; and see in accord and *contra*, 4 Moore, *op. cit.* 58, 60).

aliens liable to military service but it was afterward admitted that the 1917 enactment violated the rights of aliens, and that government departments had not directed attention to the fact of such violation when the bill was being enacted. 56 Cong. Rec. 4855 (Congressman Dent, April 9, 1918); Hearings of House Committee on Military Affairs on S. J. Res. No. 84, 65th Cong., 1st Sess., pp. 4, 10 (Secretary of State Lansing, September 26, 1917). Diplomatic protests ensued (3 Hackworth, *op. cit.*, 603, 608–610), resulting in an informal procedure for release of aliens (Letter of Secretary of State, February 14, 1918, appearing in H. Rep. No. 342, 65th Cong., 2d Sess., pp. 2–3; 56 Cong. Rec. 4857–4858; 3 Hackworth, *op. cit.* 603–605). The War Department and the Department of State suggested amendment of the 1917 Act, in a form exempting neutral aliens without attaching any consequences to the exemption. H. Rep. 342, 65th Cong., 2d Sess., p. 3. On April 9, 1918, in the debate on the proposed amendment, a letter of President Wilson was read, stating, *inter alia,* "Whatever the general merits of the question, if we could consider ourselves absolutely free with regard to it, we are unfortunately not free but are bound by definite treaty obligations * * *" (56 Cong. Rec. 4854).

On June 25, 1918, Senator Hitchcock introduced an amendment with a proviso that "If such a claim to *a*mmunity [sic] is asserted, it shall be recognized and shall operate automatically as a withdrawal and cancellation of the declaration to become an American citizen, and the individual shall forever be debarred from becoming one." Senator Hitchcock supported

the amendment on the ground that in drafting neutrals "we are violating treaties and to some extent are violating international comity"; that the War Department construed the then Act of Congress as "repealing the treaties" although the State Department was "unable to take that view of it * * *"; that debarment from future naturalization "will restrain men from setting up the claim" and was included to prevent "a good deal of ill feeling and a good deal of indignation on the part of American citizens whose sons are subjected to the draft to have their neighbors released from the draft and to stay at home to do the voting while their sons go to the war." 56 Cong. Rec. 8249.

While a part of these remarks indicated a purpose to force aliens into service, contrary to the general objective of recognizing their right to be free of service, the reference to the indignation of citizens suggests the purpose of imposing the debarment as a criterion of who would constitute a desirable citizen.

In the course of the debate, a number of Senators insisted that the mere withdrawal of the declaration would not be sufficient—that the withdrawing alien should be debarred from citizenship. While there were references to the possible effect of inducing military service by aliens, the principal emphasis was on the undesirability of exempt aliens as voters, and on the theory that the criteria of who should be a desirable American citizen could not be prescribed in treaties with foreign countries. 56 Cong. Rec. 8415–8419. Directly related to the criterion-of-citizenship basis, rather than the punishment aspect, was the

argument of Senator Lodge, "No country would submit for one moment to an agreement with another affecting the conditions on which a foreigner could become a citizen." 56 Cong. Rec. 8485.

The amendment, as enacted on July 9, 1918, provided that a neutral declarant alien (40 Stat. 885, 955):

> shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen, and he shall forever be debarred from becoming a citizen of the United States.

This statute containing the language "and he shall forever be debarred," was not as conclusive of the question whether actual relief from liability was a condition to debarment as the instant 1941 language that "any person who makes such application" (*supra*, p. 24) shall be debarred. Nevertheless, the statute was reported by Congressional committees as providing that a neutral declarant alien "shall be relieved from liability to service by *withdrawing* his declaration, *which* shall forever debar him" (H. Rep. No. 763, 65th Cong., 2d Sess., p. 5; emphasis added).[17]

[17] Petitioner relies (Pet. Br. 10) upon some language of a 1924 District Court opinion, *In re Gustavson*, 300 Fed. 251 (S. D. Cal.), assumed by petitioner to impose debarment only as a penalty where relief from service is proved. It is the holding of the case, however, that the alien there involved must be denied naturalization upon the broader ground that he had demonstrated lack of attachment to the Constitution (300 Fed. at 251). The

A modifying enactment, 13 years later, provided that no debarment should ensue if the "withdrawal [of the "intention to become a citizen"] (and the application therefor) and discharge took place after November 11, 1918 [Armistice Day]" (Act of Feb. 11, 1931, 46 Stat. 1087). This modification is significant because it refers to withdrawal (by the alien) and discharge (by the government), both of which had to occur after the armistice. To that extent, the wording demonstrates that when the Congress wishes the *government's* action upon an alien's act to be controlling, rather than the *alien's* act (as petitioner here urges that the board's IV-C classification should control rather than his own application for exemption), proper language is available. In the 1941 Act Con-

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judge's statement that the intention of the 1918 Act was "to fix a penalty where an alien declarant was relieved from military service," was dictum which, particularly in view of the different wording of the 1918 Act, is not authoritative for the construction of the 1941 Act.

Petitioner places similar reliance on *In re Siem*, 284 Fed. 868 (D. Mont.), affirmed, 299 Fed. 582 (C. A. 9). This case, like *Gustavson*, *supra*, dealt only with the question of whether lack of attachment to the Constitution was demonstrated. The alien apparently registered, claimed exemption as an alien in 1917, before the 1918 enactment granting exemption and imposing debarment, and was classified I–A (although thereafter rejected as unfit). See 284 Fed. at 868, 299 Fed. at 582. Instead of a withdrawal of declaration of intention, the alien apparently presented only a "mild insistence upon the right of exemption" (284 Fed. at 872; and see 299 Fed. at 584: "[A]n alien may be relieved from military service by withdrawing his declaration of intention, in which event he is forever barred * * *. If Congress intended that the same result should follow from the mere claim of an exemption given by law, it would have so declared.") The decision is accordingly inapposite and, indeed, speaks contrary to petitioner's position.

gress did not choose to state that a person who obtained a "discharge" or a particular IV-C classification should be debarred, but rather imposed the debarment upon "any person who makes such application". In the light of the 1931 statute, this cannot be dismissed as mere inadvertence.

2. *The period subsequent to 1941 and prior to the 1952 immigration legislation.*—The events since 1941 confirm the effect of Section 3 (a) as imposing debarment upon the alien's act of choosing exemption, without regard to whether he was actually relieved from service.

The words of legislators and administrators continued to suggest the decisiveness of the alien's application. When, in October 1945, the immigration law was amended to make specific reference, in the definition of "ineligible for citizenship", to those debarred under Section 3 (a) of the selective service legislation, the committee report quoted this letter of Attorney General Biddle:

> Section 3 (a) * * * provides that any citizen or subject of a neutral country shall be relieved from liability and training under the act if he makes application * * *, but any person who does so is thereafter debarred * * *. [H. Rep. No. 346, 79th Cong., 1st Sess., p. 2.]

In 1948, when a new selective service law was enacted, Section 4 (a) made a change by providing for debarment of any alien, *not otherwise deferable or exempt,* who made application for relief from military service, but again provided that "any person *who makes such application* shall thereafter be debarred

from becoming a citizen of the United States." (Emphasis added).[18] Again, the Congressional reports referred to the *application* as the decisive act. The Senate report (No. 1268, 80th Cong., 2d Sess., p. 6) stated:

> * * * In the event [the alien] *makes such an application,* he is thereafter barred * * *. (Emphasis added.)

And the conference report characterized the debarment as applying to the person who "sought relief", again without reference to any evidence of actual relief from service.[19]

When language similar to the instant wording, rather than that of the 1948 Act, was adopted in 1951 in Section 4 (a) of the Universal Military Training

[18] The pertinent language, 62 Stat. 604, is as follows: "* * * Any citizen of a foreign country, who is not deferable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *"

[19] The statement is as follows: "The Senate bill provided that citizens of a foreign country should be relieved from liability for training and service upon application for such relief, but provided that *any person who sought relief* should thereafter be debarred from becoming a citizen of the United States. The House amendment excluded from liability for service those aliens who have not declared their intentions to become citizens of the United States. The conference agreement adopts the provisions of the Senate bill with respect to liability for training and service of aliens but insuring that *properly deferable aliens* may be relieved from liability for induction without debarment from citizenship." (H. Rep. No. 2438, 80th Cong., 2d Sess., pp. 44–45. Emphasis added.)

nd Service Act (65 Stat. 75), it was also characterized as making the application itself the operative factor. The conference report stated: "[I]n the event that such persons request release from service, they will be debarred" (H. Rep. No. 535, 82d Cong., 1st Sess., appearing at 97 Cong. Rec. 6249); and Chairman Vinson said, "unless they request release from service, in which case they will forever be debarred from citizenship." 97 Cong. Rec. 6253.[20]

3. *The Immigration and Nationality Act of 1952.*— Petitioner relies heavily on two remarks of a committee report in 1950 (Pet. Br. 11–12), made at an early stage in the long course of the legislation which became the Immigration and Nationality Act of 1952, to show that our view of debarment is incorrect. Those remarks, in context, do not have the significance attributed to them by petitioner.

The Committee's remarks concern a draft of Section 315 which was not enacted in that form; the proposed section would have provided:

> (a) Any alien who applies or has applied for exemption or discharge from training or service in the armed forces of the United States *solely* on the ground that he is an alien, and is

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[20] Also significant is the amendment offered by Representative Sadlak, seeking to add the following to the debarring language: "Any citizen of a foreign country who, notwithstanding the relief from liability for training and service under this title afforded him by the preceding sentence, shall have enlisted in or shall have been inducted into the Armed Forces of the United States pursuant to the provisions of this title, shall be eligible for full and immediate United States citizenship in accordance with the provisions of section 22 of this title" [also offered in amendment].

The amendment was rejected. (97 Cong. Rec. 3909.)

or was relieved or discharged from such training or service *solely* on such ground, shall be barred from becoming a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service solely because he was an alien. [S. 3455, 81st Cong., 2d Sess., April 20, 1950; then Section 314; emphasis added].

It should also be noted that the bill in which this section was included did not provide a reference, as does Section 101 (a) (19) of the final enactment (App. A, *infra,* p. 49), to prior selective service legislation in this field as part of the definition of "ineligible to citizenship." It is in this context that the remarks reled upon by petitioner must be read. S. Rep. No. 1515, 81st Cong., 2d Session, stated at p. 725:

Another group of persons who are permanently barred from applying for citizenship is that group covered by the provisions of section 4 (a) of the Selective Service Act of 1948. This section provides that an alien who, not being deferrable or exempt from training and service, *applies for relief* from such training and service prior to his induction *is forever barred* from applying for naturalization. The subcommittee feels that *this provision* is in line with the general concept of the Nationality Act and will recommend that these provisions be incorporated in the proposed bill so that all requirements for naturalization may be found in one Act. ***However, the subcommittee considers that such exemption should be applied***

> *for and granted solely on the grounds of alienage, and is recommending accordingly.* [Emphasis added.]

And at p. 731:

> The subcommittee recommends enactment into the naturalization law of the *essential* provisions of section 4 (a) of the Selective Service Act of 1948 providing that an alien who, not being deferable or exempt from training and service, *applies* for relief from such training and service on the grounds of his alienage prior to his induction *shall be forever barred* from applying for naturalization. [Emphasis added.]

Petitioner seizes upon the phrase (in the first quotation from S. Rep. 1515) that "all requirements for naturalization may be found in one Act"—as indicating that after 1952 the new legislation would alone control, regardless of the prior provisions—without considering the fact that later the bill was changed to refer specifically to prior selective service legislation. Moreover, petitioner's implication that the present Section 315 of the 1952 Act (App. A, *infra*, pp. 49–50) was the subject of the committee's remarks fails to note (1) that the committee was speaking of Section 4 (a) of the 1948 Selective Service Act as expressing the "general concept" and was not interpreting Section 3 (a) of the 1940 Act, and (2) that the committee, in summarizing Section 4 (a) (and thus the general concept of former law) mentioned only the *application* for relief and said nothing of a requirement of further *grant* of the relief. Also, as noted

supra, while Section 4 (a) of the 1948 Act was similar to Section 3 (a) of the 1940 Act (as amended) in imposing permanent disbarment from citizenship, it was not, as contended by petitioner (Pet. Br. 12), a "re-enactment in *haec verbae* of Section 3 (a)," for Section 4 (a) contained language, not present in the 1941 statute, making its provisions applicable only to an alien "who is not deferable or exempt from training and service under the provisions of this title (other than this subsection)" (Act of June 24, 1948, 62 Stat. 604).

In combination, the language of the proposed bill referring to deferments *solely* on grounds of alienage,[21] plus the omission of a reference to Section 3 (a) in the definition of ineligibility to citizenship, plus the reference in the reports only to the 1948 Selective Service Act, would have created problems as to whether the bar of Section 3 (a) of the 1940 Selective Service Act, as amended, survived the 1952 Act. Presumably to foreclose that possibility in the act that finally emerged (in contrast with the bill to which S. Rep. 1515 was addressed), there was included a specific reference to debarment under Section 3 (a) of the 1940 Act, as well as to Section 4 (a) of the 1948 Act, in the definition of "ineligible to citizenship" in S. 716 and H. R. 2379, 82d Cong., 1st Sess., introduced, respectively, on January 29, and February 5,

[21] In the preceding July 1949, Moser, a Swiss alien, had been upheld in the contention that he had not applied for exemption under Section 3 (a) of the 1940 Act solely on the grounds of alienage but upon the ground of a treaty between Switzerland and the United States concerning aliens. *Petition of Moser*, 85 F. Supp. 683 (E. D. N. Y.). See *Moser* v. *United States*, 341 U. S. 41.

1951, and which became the 1952 Act. Moreover, there was omitted from the final draft of Section 315 (a) the word "solely".[22]

It seems clear, therefore, not only that the language of S. Rep. 1515 on which petitioner relies has no significance to the question here at issue, but that Section 315 (a), whatever its meaning, does not serve to change the effect of debarment already accomplished under Section 3 (a) of the Selective Training and Service Act of 1940, as amended. As pertinent to the present case, Section 315 (a), as finally enacted, must be viewed simply as a provision coordinate with Section 101 (a) (19) (App. A, *infra*, p. 49)—defining "ineligible to citizenship"—and supplementing it by covering any exemptions not covered by the recognition of the earlier Acts in Section 101 (a) (19).[23]

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[22] A parallel change was made in selective service legislation. The Act of June 19, 1951 (65 Stat. 75), omitted from the new Section 4 (a) of the Universal Military Training and Service Act, the language of the 1948 Act, "who is not deferable or exempt from training and service under the provisions of this title (other than this subsection)", and returned to the language of Section 3 (a) of the 1940 Act. The 1951 wording provided that an alien, of the specified age, not exempt from registration, who remained in the United States in a status other than that of a permanent resident for over one year "shall be relieved from liability for training and service under this title if, prior to his induction into the Armed Forces he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but *any alien who makes such application shall thereafter be debarred* from becoming a citizen of the United States" (emphasis added). 65 Stat. 75. The same provision appeared with respect to service in the National Security Training Corps.

[23] There were a number of areas in which this residual coverage could well have been thought necessary. For example, *McGrath* v. *Kristensen*, 340 U. S. 162, held that the making of application

The operative effect of Section 315 (a) itself is not in issue here since petitioner does not seek naturalization. As we point out *infra*, pp. 46–47, petitioner cannot rely upon it as establishing his eligibility to citizenship in this case since his application for suspension of deportation is based on the pre-1952 Act, and must be determined by his eligibility to citizen-

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by one who was not liable for service at the time (and therefore was not relieved from service) was not a bar to citizenship; the coupling of the application with relief, in Section 315 (a), may well have been intended to establish the same rule. Also the enduring nature of the 1918 debarment was expressly recognized by the reports of the congressional committees which considered the 1931 legislation (*supra*, p. 37; and see H. Rep. 910, S. Rep. 923, 71st Cong., 2d Sess.). While Congress, in 1940 (Section 504 of the Nationality Act, 54 Stat. 1137, 1172), specifically attempted to repeal the 1918 debarment (Immigration and Naturalization Service, Interpretation No. 1, June 5, 1941), lower courts were divided as to whether the 1940 repealer terminated the disqualification. See *In re Urmeneta*, 42 F. Supp. 138 (E. D. Wis.) and *In re Samowich*, 70 F. Supp. 273 (W. D. Wash.). Debarment might thus be assured only under Section 315 (a).

The drafters of the legislation could also have had in mind enemy aliens who obtained exemption by making objection to service in awareness of the policy of the armed forces to reject objecting aliens. See *Petition of Caputo*, 118 F. Supp. 870 (E. D. N. Y.). The subsequent rejection of this view does not dispel its possible purpose. *Petition of Zumsteg*, 122 F. Supp. 670 (S. D. N. Y.); *Petition of Schulz*, 384 Pa. 558; 121 A. 2d 164, 166. See the vigorous dissenting opinion of Judges Musmanno and Bell in *Schulz*, *supra*, 384 Pa., 121 A 2d at 167, urging Section 315 (a) as applicable in that case.

Similarly, the situation presented by *Moser* v. *United States*, 341 U. S. 41, of a person claiming exemption as an alien under treaty rights might have been thought within the purview of Section 315, although later a court held to the contrary, *Petition of Berini*, 112 F. Supp. 837 (E. D. N. Y.). The fact that Section 315 was made applicable "notwithstanding" the savings clause shows an intent to cover broadly exempt aliens otherwise free from disbarment.

ship under the pre-1952 statutes. It is sufficient here to point out that, as we have shown, there is nothing in the language or the legislative history of Section 315 (a) which detracts from the clear language and full history of Section 3 (a) of the 1940 Act, as amended, and which, certainly before 1952, rendered petitioner ineligible to citizenship on the basis of his application alone.

IV. PETITIONER'S REQUEST FOR SUSPENSION OF DEPORTATION, MADE BEFORE THE 1952 ACT, IS NOT TO BE DETERMINED UNDER THE 1952 LAW

The instant case is not governed by the provisions of the 1952 Act or by decisions in which naturalization is sought under the 1952 Act. Our discussion of the provisions of the 1952 Act (*supra*, pp. 40–46), solely for the light the new provision may afford on the earlier provisions, must not obscure the fact that petitioner made his application for suspension of deportation before the 1952 Act was enacted. He had the benefit of the less stringent requirements as to showing of hardship embodied in the earlier Act.[24] He filed no petition for naturalization under the 1952 Act and his eligibility to citizenship, as a requirement of his requested relief of suspension of deportation, was not and could not be determined upon the basis of 1952 provisions not even in existence. He cannot now demand suspension of deportation under the earlier, less stringent, requirements as to hardship and simultaneously seek to have his eligibility to citizenship (another prerequisite for such suspension under the former act) determined by the later law.

[24] The standard of the 1917 Act, as amended, of "serious economic detriment" to dependents has, under Section 244 of the 1952 Act, been changed to "exceptional and extremely unusual hardship."

We do not concede that petitioner would be eligible for citizenship under the 1952 Act. In the first place, as urged in Point II, we think the record shows that petitioner both applied for and was granted relief from service on the ground of alienage. *Supra*, pp. 16–23. Furthermore, as discussed *supra*, pp. 40–46, we think that Section 315 (a) does not serve to change the effect of an accomplished debarment of citizenship under Section 3 (a) of the Selective Training and Service Act of 1940, as amended. But, in any event, and even if we are wrong as to a future application for naturalization by petitioner, he cannot have his present request for relief from deportation determined by the 1952 Act.[25]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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OCTOBER 1956.

[25] By now, petitioner appears to have the residence requirements for an application for suspension of deportation under Section 244 of the 1952 Act. He can apply for relief under that Act, not because he is eligible for citizenship, but because the Board of Immigration Appeals has indicated that, under the 1952 Act, eligibility for citizenship is not a prerequisite for suspension of deportation under Section 244. *Matter of G.* 5 I & N. Dec. 106. Petitioner will, in that event, have to meet the standard of economic hardship of the 1952 Act.

APPENDIX A

STATUTES INVOLVED

Section 3 (a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U. S. C. App. (1946 ed.) 303 (a), provided:

> Except as otherwise provided in this Act, every male citizen and every other male person residing in the United States, who is between the ages of nineteen and forty-five * * * shall be liable for training and service in the land and naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

Section 19 (c) of the Immigration Act of 1917, as amended, 62 Stat. 1206, 8 U. S. C. (1946 ed. Supp. V) 155, provided:

> In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen * * * who is the spouse, * * * or minor child of such deportable alien * * *.

Section 28 (c) of the Immigration Act of 1924, as amended by the Act of October 29, 1945, 59 Stat. 551, 8 U. S. C. (1946 ed.) 224 (c) provided:

> The term "ineligible to citizenship", when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under * * * section 3 (a) of the Selective Training and Service Act of 1940, as amended, (55 Stat. 845; U. S. C., title 50, App. Supp. III), section 303 (a), or under any law amendatory of, supplementary to, or in substitution for, any such sections; * * *.

The Immigration and Nationality Act of 1952, Sections 101 (a) (19), 315, 405, 66 Stat. 169, 242, 280, 8 U. S. C. 1101 (a) (19), 1426, 1101 fn., provides:

> [§ 101 (a)] (19). The term "ineligible to citizenship", when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3 (a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4 (a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76) or under any section of this Act, or any other Act * * *.
>
> [§ 315] (a). Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

[§ 405] (a). Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended * * * which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

APPENDIX B

The Circumstances of Petitioner's Signing of the Exemption Forms

The circumstances concerning the signing of the exemption forms have been stated by petitioner at different times to different effect. In a sworn affidavit before the United States Consul at Mexico City, petitioner denied ever having signed a Form 301 (R. 32, 85). In a hearing before a Special Inquiry Officer of the Immigration Service on July 31, 1951, at which hearing the officer placed the Form 301 itself in evidence (R. 35), petitioner asserted that he and other Latins discussed the situation, "not being able to ask anybody in the draft board about what was the best procedure to follow due to the fact that at that time millions of boys were being drafted and the forms were being handed to you to be filled if you wanted to fill them" (R. 36). Petitioner and his friends decided that they would prefer to serve in the Colombian army, rather than the United States army (R. 32, 36), for the following reasons (R. 36):

> * * * If we went into the United States Army we felt that we would not have the same opportunity of being treated as fair as a native of the United States, and not only because we were aliens but also because being used to tropical climates that we might be sent to places that were extremely full of tropical or other diseases. * * *

Petitioner, at the same 1951 hearing, testified that he thought Form 301 involved only a temporary deferment "pending indication from the same draft board as to what would be the best choice for me as to

whether I wanted to serve in the Colombian Army or the United States Army" (R. 32, 36–37).

Interrogated as to his earlier affidavit before the United States Consul in which he denied signing of Form 301, petitioner stated that he "never thought the fact that [he] signed that form before was still in effect," since, upon Colombia's later declaration of war, he had been called by the selective service board, although he was never called for induction prior to Colombia's belligerency, and he was never actually inducted into the United States armed forces, due to exemption for physical condition (R. 32–33). Petitioner further asserted that he did not understand that in signing Form 301 he was signing a paper by which his citizenship would be affected (R. 34), but he at no point testified to inability to understand the meaning of what he signed.

At the reopened hearing on January 25, 1954, petitioner asserted that he had discussed the signing of the forms with the selective service board as well as with fellow Latins (R. 57–61, 64, 66). He asserted that in May 1942 he lost his registration card and went to the selective service board to get a copy and again went to the board to notify it of a change of address; that on these occasions he discussed with the board the matter of serving in a division of Colombians "within the United States army" (R. 57–58); that he had further discussions as to the same effect with the board and with fellow Latins upon receipt of Forms 304 and 301 (R. 57–59). He could not state, however, with whom he had spoken at the board (R. 64).

Petitioner had no explanation for having written an absolute refusal to serve, in his Forms 304 and 301, instead of writing some explanatory statement of willingness to serve in a Colombian unit of the United

States army (R. 64). He testified that he did not understand that he was asking to be relieved from military service (R. 61). With respect to the clause in Form 301 specifically stating that debarment from citizenship would result from making application for relief from service, petitioner stated, "the fact that I would serve in the United States Army would automatically eliminate that clause" (R. 65).

The special inquiry officer concluded that petitioner "understood the language of the form [301] which is simple" (R. 71); that, on the basis of petitioner's affluent business standing and general demeanor, he was a person of intelligence and ability to understand documents, even of complex nature (R. 75); and that there was no evidence that the selective service board informed petitioner that a special group of Colombians was being formed for the United States armed forces (R. 75).

The Board of Immigration Appeals, in dismissing petitioner's appeal, pointed out, *inter alia*, the same considerations that the special inquiry officer had noted, *i. e.*, petitioner's familiarity with the English language as a translator, his intellectual capacity as a successful businessman to understand the forms involved, and the simplicity and clarity of the forms themselves (R. 81–83). With respect to petitioner's more recent claims of misunderstanding and of discussions with the selective service board, the Board considered petitioner's inconsistencies to be such that "his recollection of events cannot be relied upon" (R. 83, 89). With respect to petitioner's attempted explanation of the fact that he had denied before the United States Consul ever having signed Form 301, the Board found "such a selective attitude by [petitioner] toward facts that his candidness must be questioned" (R. 85).

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